

EXHIBIT D
ELECTRIC PROGRAM INVESTMENT CHARGE (EPIC) SPECIAL
CONTRACT TERMS AND CONDITIONS FOR THE CALIFORNIA
SUSTAINABLE ENERGY ENTREPRENEUR DEVELOPMENT (CaISEED)
INITIATIVE

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ATTACHMENT 1 CONFIDENTIAL DELIVERABLES, PROJECT-RELEVANT PRE-EXISTING AND INDEPENDENTLY FUNDED INTELLECTUAL PROPERTY, CONTRACTOR-OWNED AND LICENSED INTELLECTUAL PROPERTY, AND GRANTEE INTELLECTUAL PROPERTY

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EXHIBIT D

EPIC SPECIAL CONTRACT TERMS AND CONDITIONS

1. *Introduction*

This contract (Agreement) between the California Energy Commission (Energy Commission, or Commission) and the California Clean Energy Fund, dba, CalCEF Ventures (“Contractor”) is funded by: (1) the Electric Program Investment Charge (EPIC), an electricity ratepayer surcharge authorized by the California Public Utilities Commission (CPUC); and (2) the Energy Resources Programs Account.

This Agreement includes: (1) the Agreement signature page (**form STD 213**); (2) the scope of work (**Exhibit A**); (3) the budget (**Exhibit B**); (4) the state general terms and conditions (**Exhibit C**); (5) these terms and conditions (**Exhibit D**); (6) any additional provisions that address the unique circumstances of the funded project (**Exhibit E**); (7) a contacts list (**Exhibit F**); (8) all attachments; and (9) all documents incorporated by reference.

All work and expenditure of funds (Commission-reimbursed and/or match share) must occur within the Agreement term specified on the STD 213 form.

The Contractor shall develop and implement the Sustainable Energy Entrepreneur Development (SEED) Initiative. The maximum Agreement amount is \$66,000,000, which consists of a maximum of \$18,000,000 for the Contractor’s activities and a minimum of \$48,000,000 in grant awards (Grants or Grantees). The services being contracted for include awarding and managing the Grants and providing technical consulting to the recipients of the Grants. The Contractor’s services to the Energy Commission are consulting services pursuant to Public Contract Code 10335.5 and are subject to DGS review under Public Contract Code Section 10295.

The Energy Commission is authorized to award grants under the EPIC Program enabling legislation, Public Resources Code Section 25711.5. The Contractor is a conduit of the grants that will be awarded to provide assistance to Grantees, and the Grants do not result in the performance of services by the Grantees to the Energy Commission. The Energy Commission will not take title to equipment, copyrights, or patents acquired by the Grantees; the Energy Commission does not have a statutory obligation to fund early stage energy technologies; and the performance under the Grants is not controlled by the Energy Commission. The Grantees are being provided assistance to carry out their own research projects and are not providing services to the Energy Commission or Contractor. The Grants directly benefit each Grantee’s research program. The products produced by the Grantees are a by-product of the main purpose of the Grants. The products are used to monitor the use of grant funds and do not result in a service to the Energy Commission or Contractor. The Grants that are awarded to the Grantees are grants exempt from DGS review under State Contract Manual section 4.06.

2. *Documents Incorporated by Reference*

The documents below are incorporated by reference into this Agreement. These terms and conditions will govern in the event of a conflict with the documents below, with the exception of the documents in subsection (h). Where this Agreement or California laws and regulations are silent or do not apply, the Energy Commission will use the federal cost principles and acquisition regulations listed below as guidance in determining the

allowability of items included in the budget. Documents incorporated by reference include:

Solicitation Documents (if applicable)

- a. The funding solicitation for the project supported by this Agreement
- b. The Contractor's proposal submitted in response to the solicitation

Department of General Services Terms and Conditions

- c. Exhibit C, General Terms and Conditions (GTC 610)
- d. Contractor Certification Clauses (CCC 307), as incorporated by reference in Exhibit C (GTC 610), Section 11.

Federal Cost Principles (applicable to state and local governments, Indian tribes, institutions of higher education, and nonprofit organizations)

- e. 2 Code of Federal Regulations (CFR) Part 200, Subpart E (Sections 200.400 et seq.)

Federal Acquisition Regulations (applicable to commercial organizations)

- f. 48 CFR, Ch.1, Subchapter E, Part 31, Subpart 31.2: Contracts with Commercial Organizations (supplemented by 48 CFR, Ch. 9, Subchapter E, Part 931, Subpart 931.2 for Department of Energy grants)

Federal Audit Requirements

- g. 2 CFR Part 200, Subpart F (Sections 200.500 et seq.): Audits of States, Local Governments, and Non-Profit Organizations

General Laws

- h. Any federal, state, or local laws or regulations applicable to the project that are not expressly listed in this Agreement
- i. 10 CFR Part 600: U.S. Department of Energy Financial Assistance Regulations

3. Standard of Performance

In performing work under the Agreement, the Contractor, its Subcontractors, Vendors, and any lower tiered level of Sub-Subcontractors and Vendors, and their employees are responsible for exercising the degree of skill and care required by customarily accepted good professional practices and procedures for the type of work performed.

The Contractor and its Subcontractors, Vendors, and any lower tiered level of Sub-Subcontractors and Vendors, shall bear any costs that result from failure to meet this standard, including the cost of re-performance of work that was not performed to the Commission Agreement Manager's reasonable satisfaction. Nothing contained in this section limits any of the rights or remedies available to the Energy Commission under law or at equity. The following provisions apply if the Commission Agreement Manager requires the re-performance of work:

- a. The Contractor and/or Subcontractors, Vendors, and any lower tiered level of Sub-Subcontractors and Vendors, shall bear the expense of re-performing any work that was not performed to the Commission Agreement Manager's reasonable satisfaction. The work must be completed within the original timeframe identified in the project schedule, unless the Commission Agreement Manager determines that re-performance is not possible within the timeframe. In

this event, the Commission Agreement Manager will provide a new schedule for re-performance.

- b. The Contractor and/or Subcontractors, Vendors, and any lower tiered level of Sub-Subcontractors and Vendors, shall work any overtime required to meet the task deadline at no additional cost to the Energy Commission.

If the Contractor and/or Subcontractor, Vendor, and any lower tiered level of Sub-Subcontractors and Vendors, does not perform work to the Commission Agreement Manager's reasonable satisfaction but the Commission Agreement Manager does not require the re-performance of the work, the Commission Agreement Manager and Contractor Project Manager will negotiate a reasonable settlement for satisfactory services rendered. No previous payment will be considered a waiver of the Energy Commission's right to reimbursement.

4. Due Diligence

The Contractor shall take timely action to move this project to completion. The Commission Agreement Manager will periodically evaluate the Schedule of Products and Due Dates for completion of Scope of Work tasks. If the Commission Agreement Manager determines that: (1) the Contractor has not been diligent in performing or completing the tasks in the Scope of Work; or (2) the time remaining in this Agreement is insufficient to complete all project tasks by the Agreement end date, the Commission Agreement Manager may recommend that this Agreement be terminated, and the Commission may terminate this Agreement without prejudice to any of the Commission's other remedies.

5. Performance Evaluation

In accordance with California Public Contract Code Sections 10367 through 10370, the Energy Commission will prepare a performance evaluation upon the completion of this Agreement if it is a consulting services contract that totals \$5,000 or more. "Consulting services contract" is defined in California Public Contract Code Section 10335.5.

If the Energy Commission files an unsatisfactory evaluation with the Department of General Services (DGS), it will notify and send a copy of the evaluation to the Contractor within fifteen (15) days. The Contractor will have thirty (30) days to prepare and send a statement to the Energy Commission and DGS defending its performance. The Contractor's statement will be filed with the evaluation in the Energy Commission's contract file and with DGS for thirty-six (36) months.

In accordance with Public Contract Code Section 10370, neither the evaluation nor any Contractor statement will be a public record.

6. Deliverables and Products

- a. **"Deliverables"** are any tangible item specified for delivery to the Energy Commission by the Contractor in the Scope of Work, such as reports and summaries.
 - The Contractor shall submit all deliverables prepared during the invoicing period to the Accounting Office along with the invoice, as specified in subsection (c) of Section 9 (Payment of Funds).

If the Commission Agreement Manager determines that a deliverable is substandard given its description and intended use as described in the Scope of Work, the Commission Agreement Manager may refuse to authorize payment for

the deliverable and any subsequent deliverables that rely on or are based upon the deliverable under this Agreement.

“**Products**” are any tangible item specified for delivery to the Contractor by the Grantees in the Grants, such as reports and summaries.

- The Contractor shall submit all products identified in the Grants to the Commission Agreement Manager, in the same manner and form specified in the Grants.

If the Commission Agreement Manager determines that a product is substandard given its description and intended use as described in the Grant, the Commission Agreement Manager may refuse to authorize payment for the product and any subsequent products that rely on or are based upon the product under this Agreement.

b. Confidential Deliverables and Products

Please see Section 22 (Confidentiality) for instructions regarding confidential deliverables and products.

c. Rights in Deliverables and Products

The Energy Commission owns all deliverables identified in the Scope of Work and all Contractor Intellectual Property developed under this Agreement, unless otherwise specified in Attachment 1, Section 4 of this Exhibit. Please see Section 24 (Intellectual Property).

The Contractor shall include terms in its agreements with Grantees to ensure that the Energy Commission owns all products identified in the Grants, with the exception of products that fall within the definition of “Grantee Intellectual Property.” As between the Energy Commission, Contractor, and Grantee, the Grantee owns all Grantee Intellectual Property developed under the Grant (please see Section 24 (Intellectual Property)), and the Grantee has a non-exclusive, non-transferable, irrevocable, worldwide, perpetual license to use, publish, translate, modify, and reproduce products that do not fall within the definition of “Grantee Intellectual Property.”

The Contractor shall include terms in its agreements with Subcontractors, Vendors, any lower-tiered level of Sub-Subcontractors and Vendors, to ensure the Energy Commission owns all deliverables identified in the Scope of Work and owns all Contractor Intellectual Property.

d. Failure to Submit Deliverables and Products

Failure to submit a deliverable required in the Scope of Work or a product required in the Grants will be considered material noncompliance with the Agreement terms, unless the Commission Agreement Manager waives the failure in writing. Noncompliance allows the Energy Commission to take any actions, seek any remedies, or exercise any rights available to it, such as the withholding of future payments or awards, or the suspension or termination of the Agreement.

e. Final Report and Payment

The Contractor may only submit a request for the final payment (including any retention) after the final report is completed and the Commission Agreement

Manager has verified satisfactory completion of work.

f. Legal Statements on Deliverables and Products

- 1) All documents that result from work funded by this Agreement and are released to the public shall include the following statement to ensure no Commission endorsement of documents:

LEGAL NOTICE

This document was prepared as a result of work sponsored by the California Energy Commission. It does not necessarily represent the views of the Energy Commission, its employees, or the State of California. The Energy Commission, the State of California, its employees, contractors, subcontractors, and subawardees make no warranty, express or implied, and assume no legal liability for the information in this document; nor does any party represent that the use of this information will not infringe upon privately owned rights. This document has not been approved or disapproved by the Commission, nor has the Commission passed upon the accuracy of the information in this document.

- 2) The Contractor, Grantees, Subcontractors, Vendors, any lower tiered level of Sub-Subcontractors and Vendors shall apply copyright notices to all documents prepared for this Agreement that are released to the public (including reports, articles submitted for publication, and all reprints) using the following form or any other form that may be reasonably specified by the Energy Commission.

“@[Year of first publication of deliverable] [the Copyright Holder’s name]. All Rights Reserved.”

7. Amendments

- a. Except as stated in this section, please see the incorporated GTC 610, section 2, required by the Department of General Services, for amendments.
- b. This Agreement, especially in Exhibit B, the Budget, may contain names of personnel in various job classifications. The names are only provided for the convenience of the parties. The names are not considered part of this Agreement. As such, changing the names of personnel in various job classifications is not considered a “variation of the terms” in the incorporated GTC 610, section 2, or other change that would require an amendment to this Agreement.
- c. Exhibit B, the Budget, contains the budget categories of Direct Labor, Fringe Benefits, Travel, Equipment, Materials/Miscellaneous, Subcontractors (now Subcontractors and Vendors), Indirect Costs, and Profit. Neither the CEC nor Contractor can possibly predict to the dollar the budget that will be needed for this Agreement over the life of this Agreement. Neither party wants to spend administrative time and expenses on unnecessary amendments just to move funds between categories during the term of this Agreement. Accordingly, both the CEC and Contractor agree that the amount of funds listed in each budget category, except for Profit, is an estimate. The flexibility in this section does not apply to the budget category of Profit. As long as the Contractor does not exceed the total Agreement amount and provides 5 days prior written notice to the

Commission Agreement Manager, it can move funds between categories without an amendment to this Agreement within a limit of plus or minus 50% of the funds originally allocated to the budget category or \$100,000, whichever is more. For example, if Direct Labor had \$300,000 originally allocated to it, over the life of the Agreement, the Contractor could move up to \$150,000 in or out of Direct Labor (i.e., end up with a minimum of \$150,000 or a maximum of \$300,000) without an amendment. As another example, if Travel only had \$20,000 originally allocated to it, all of Travel (since it is less than \$100,000) could be moved to a different category or up to \$100,000 could be moved into Travel (i.e., end up with a minimum of \$0 or a maximum of \$120,000), without an amendment. Changes within this allowed plus or minus 50% range or \$100,000, whichever is more, are not considered a “variation of the terms” in the incorporated GTC 610, section 2, or other change that would require an amendment to this Agreement.

- d. Because the goal of this part c. is to prevent unnecessary amendments, any funds added to the categories of Travel, Equipment, Materials and Miscellaneous, will necessarily increase the items beyond those listed in the agreement. Such changes are not considered a “variation of the terms” in the incorporated GTC 610, section 2, or other change that would require an amendment to this Agreement. But other restrictions might apply (see for example part 7.e. and section 10 below).
- e. In addition to overall amounts for budget categories described in c. directly above, Exhibit B, the Budget, also contains rates within certain categories. For example, within the Direct Labor category, hourly or monthly salary rates are listed for each job classification. The rates in the budget for Direct Labor and Fringe Benefits are estimates, not capped rates, and the Contractor can invoice at higher rates as long as it is (1) only invoicing for actual expenditures, (2) the invoices do not exceed the total amount in each Budget Category (i.e., total as changed by c. directly above or as amended), and (3) the change does not go higher than 50% more than the original rate. For example, if the hourly rate is \$100 per hour, the Contractor could go up to \$150 per hour without needing an amendment. Changes within this allowed plus or minus 50% range to Direct Labor and Fringe Benefit rates are not considered a “variation of the terms” in the incorporated GTC 610, section 2, or other change that would require an amendment to this Agreement. All other remaining rates other than Direct Labor and Fringe Benefits are caps and limit the maximum amount allowed to be billed and would require an amendment to change.
- f. In addition to the requirements in 7.c. directly above in this Exhibit D, the Commission Agreement Manager must approve in writing of any new materials and miscellaneous expenses of \$5,000 or more or new equipment the Contractor plans to purchase and be reimbursed under this Agreement that is not already listed in Exhibit B, Budget. To accomplish this, the Contractor can submit either prior to invoicing or with its invoice a completed form titled "NEW EQUIPMENT/M&M FORM" which includes a description of the item and a brief explanation of the need for the item. The Commission Agreement Manager will approve items that he or she determines to be necessary to the Agreement and do not exceed total budgeted amounts for the applicable Budget Category (i.e., total as changed by c. directly above or as amended).
- g. Any restrictions in the solicitation or elsewhere in the Agreement still apply to the specific items under Materials and Miscellaneous, and Equipment that can be

purchased using Commission Funds or Match Share Funds. The restrictions still apply even though the Commission Agreement Manager does not have to approve new materials and miscellaneous expenses under \$5,000.

- h. Throughout the Agreement term, additions or other changes to Attachment 1 to this Exhibit, “Confidential Deliverables, Project-Relevant Pre-Existing and Independently Funded Intellectual Property, Contractor-Owned and Licensed Intellectual Property, and Grantee Intellectual Property” are not considered a “variation of the terms” in the incorporated GTC 610, section 2, or other change that would require an amendment to this Agreement. Changes to the list of confidential deliverables must be in writing, signed by both sides, and if applicable must follow the process explained on the form for obtaining a confidential designation. Changes to the list related to intellectual property need to be in writing and signed by the entity (Contractor, Subcontractor, Vendor, any lower tiered level of Sub-Subcontractor or Vendor, or Grantee) responsible for the intellectual property.

8. Contracting and Procurement Procedures

This section provides general requirements for all agreements entered into between the Contractor and third parties (e.g., Subcontractors, Vendors, and Grantees) and agreements between Subcontractors, Vendors, and Grantees and all lower levels of Subcontractors and Vendors, and Grantees for the performance of this Agreement or any portion thereof. Where these terms require the Contractor to flow down terms to Subcontractors, Vendors, and Grantees, the Contractor shall ensure that its agreement with Subcontractors, Vendors, and Grantees also require the flow down of these terms to every lower-tiered level of Sub-Subcontractor, Vendor, and Grantee.

a. Subcontractors and Vendors

This Agreement recognizes that not all subcontractors are the same. Some are entrusted with significant responsibility to meet the Agreement’s objectives, and others are merely suppliers of goods and services.

The Contractor may, with Commission Agreement Manager written approval, divide the third parties it contracts with into Subcontractors and Vendors. If this distinction is not made between Subcontractors and Vendors, all entities will be treated as Subcontractors.

- b. A Subcontractor is defined as a person or entity that receives Agreement funds directly from the Contractor and is entrusted by the Contractor to make decisions about how to conduct some of the Agreement’s activities. A Subcontractor’s role involves discretion over Agreement activities and is not merely just selling goods or services.

Characteristics which support the classification of the entity as a Subcontractor include when the entity:

- 1) Has its performance measured in relation to whether objectives of a Commission program were met;
- 2) Has responsibility for programmatic decision-making;
- 3) Is responsible for adherence to applicable Commission program requirements specified in the Commission award agreement;

- 4) In accordance with its agreement, uses the Commission funds to carry out a program for a public purpose specified in authorizing statute, as opposed to providing goods or services for the benefit of the Contractor or Subcontractor; or,
 - 5) Provides match share funding contributions to the Commission-funded project.
- c. A Sub-Subcontractor has the same meaning as a Subcontractor except that it receives funds from a Subcontractor. There can also be further levels below of Sub-Subcontractors.
- d. A Vendor is defined as a person or entity that sells goods or services to the Contractor, Subcontractor, or any lower-tiered level of Sub-Subcontractor, in exchange for some of the Agreement funds, and does not make decisions about how to perform the Agreement's activities. The Vendor's role is ministerial and does not involve discretion over Agreement activities. A vendor is an entity selected through a competitive process or is otherwise providing a product or service at a fair and reasonable price. Characteristics indicative of a procurement relationship between the Contractor, Subcontractor, and any lower-tiered level of Sub-Subcontractor and a Vendor are when the Vendor:
- 1) Provides the goods and services within normal business operations;
 - 2) Provides similar goods or services to many different purchasers;
 - 3) Normally operates in a competitive environment;
 - 4) Provides goods or services that are ancillary to the operation of the Commission program; and
 - 5) May not be subject to compliance with all of the requirements of the Commission program as a result of the agreement, though similar requirements may apply for other reasons.
- e. Contractor's Obligations to Subcontractors
- 1) The Contractor is responsible for handling all contractual and administrative issues arising out of or related to any subcontracts it enters into for the performance of this Agreement.
 - 2) Nothing contained in this Agreement or otherwise creates any contractual relation between the Commission and any Subcontractors or any lower tiered level of Sub-Subcontractors , and no subcontract may relieve the Contractor of its responsibilities under this Agreement. The Contractor agrees to be as fully responsible to the Commission for the acts and omissions of its Subcontractors, and any lower tiered level of Sub-Subcontractors, or persons directly or indirectly employed by any of them as it is for the acts and omissions of persons directly employed by the Contractor.

The Contractor's obligation to pay its Subcontractors is an independent obligation from the Commission's obligation to make payments to the Contractor. As a result, the Commission has no obligation to pay or enforce the payment of any funds to any Subcontractor or any lower tiered level of Sub-Subcontractors .

- 3) The Contractor is responsible for establishing and maintaining contractual agreements with and reimbursing each Subcontractor for work performed in accordance with the terms of this Agreement.
 - 4) The Contractor shall be responsible for all work performed by its Subcontractors and any lower tiered level of Sub-Subcontractors under this Agreement. This includes, but is not limited to:
 - Overseeing the Subcontractor's work;
 - Ensuring that the Subcontractor timely and diligently complete all work in a satisfactory, workmanlike manner;
 - Ensuring that all Subcontractor costs submitted to the State for reimbursement are reasonable, allowable costs, and that no unallowable costs are submitted to the State for reimbursement.
- f. Contractor's Obligations to Vendors
- 1) The Contractor is responsible for handling all contractual and administrative issues arising out of or related to any contracts it enters into with Vendors.
 - 2) Nothing contained in this Agreement or otherwise creates any contractual relation between the Commission and any Vendors, and no subcontract may relieve the Contractor of its responsibilities under this Agreement.

The Contractor's obligation to pay its Vendors is an independent obligation from the Commission's obligation to make payments to the Contractor. As a result, the Commission has no obligation to pay or enforce the payment of any funds to any Vendor.
 - 3) The Contractor is responsible for establishing and maintaining contractual agreements with and reimbursing each Vendor for work performed in accordance with the terms of this Agreement.
 - 4) The Contractor shall be responsible for all work performed by its Vendors, including but not limited to:
 - Overseeing the Vendor's work;
 - Ensuring that the Vendors timely and diligently complete all work in a satisfactory, workmanlike manner;
 - Ensuring that all Vendors costs submitted to the State for reimbursement are at a fair and reasonable price for providing the product or service.
- g. Contractor's Obligations to Grantees
- 1) The Contractor is responsible for handling all contractual and administrative issues arising out of or related to any Grants it enters into under this Agreement.
 - 2) Nothing contained in this Agreement or otherwise creates any contractual relation between the Commission and any Grantee, and no Grant may relieve the Contractor of its responsibilities under this Agreement. The Contractor agrees to be as fully responsible to the Commission for the acts and omissions of Grantees or persons directly or indirectly employed

by any of the Grantees as it is for the acts and omissions of persons directly employed by the Contractor.

The Contractor's obligation to pay its Grantee is an independent obligation from the Commission's obligation to make payments to the Contractor. As a result, the Commission has no obligation to pay or enforce the payment of grant funds to any Grantee.

- 3) The Contractor is responsible for maintaining Grants with and reimbursing each Grantee for work performed in accordance with the terms of the Grant.
 - 4) The Contractor is responsible for all work performed by Grantees under this Agreement. This includes, but is not limited to:
 - Overseeing the Grantee's work;
 - Ensuring that the Grantee timely and diligently complete all work in a satisfactory, workmanlike manner;
 - Ensuring that all Grantee costs for Grants over \$150,000 submitted to the State for reimbursement are reasonable, allowable costs, and that no unallowable costs are submitted to the State for reimbursement.
 - Ensuring that all Grantee costs for Grants of \$150,000 or less have met the applicable milestone according to the milestone budget prior to payment and costs are reasonable and allowable.
- h. Process for Adding or Replacing Subcontractors and Vendors
- 1) Prior to adding Subcontractors to the Agreement, the Contractor will take the following actions:
 - Offer the work to qualified Subcontractors listed in the Agreement.
 - If all qualified Subcontractors listed in the Agreement decline the work, provide the Commission Agreement Manager with documentation from the Subcontractors that were offered and declined the work.
 - Request approval of the change by the Commission Agreement Manager, in accordance with Section 7(c).
 - 2) The Contractor will use one of the following bidding procedures to select Subcontractors that will be added to the Agreement:
 - A competitive bid process with written evaluation criteria, which involves obtaining three or more bids and advertising the work to a suitable pool of Subcontractors. Potential advertising sources include the California Contracts Register, the Contractor's mailing lists, mass media, professional papers or journals, websites, and telephone and email solicitations.
 - A non-competitive bid process with a specific Subcontractor.
 - 3) In order to add Subcontractors, and any lower tiered level of Sub-Subcontractors, to Exhibit B, the Commission Agreement Manager must submit a "Subcontractor Addition" form (CEC-97) to the Commission

Agreement Officer. The form identifies the new Subcontractor and any lower tiered level of Sub-Subcontractors, bidding method used (competitive or non-competitive), and the tasks the new Subcontractor and any lower tiered level of Sub-Subcontractors will perform.

- 4) Changing or replacing Subcontractors or Vendors and any lower tiered level of Sub-Subcontractors and Vendors requires advance written approval by at least the Commission Agreement Manager. A higher level of approval may be required based upon Energy Commission policy. Required approvals are included in the "Changes to Contracts - Level of Approval and Notification Chart" commonly referred to as the "Changes Chart." Approval from the Department of General Services may also be needed.

i. Process for Entering Into Grants

- 1) As part of the work performed in accordance with the terms of this Agreement, the Contractor shall enter into Grants to award Series A and Series B SEED grant funds pursuant to the Scope of Work.
- 2) The Contractor shall use a competitive bid process with written evaluation criteria.
- 3) Prior to entering into a Grant, the Contractor shall do the following:
 - Recommend projects to the Energy Commission for grant funding with a recommendations package in accordance with Task 4 in Exhibit A, Scope of Work, and any additional information as requested by the Commission Agreement Manager.
 - Receive written approval from the Energy Commission to enter into the Grant.
- 4) Grantees may not be changed or substituted without prior written approval from the Energy Commission.

j. Flow-Down Provisions

Subcontracts with Subcontractors and Vendors and any lower tiered level of Sub-Subcontractors and Vendors funded in whole or in part by this Agreement shall include language conforming to the provisions below, unless the subcontracts are entered into with the University of California (UC) or the U.S. Department of Energy (DOE) national laboratories. The Contractor and its Subcontractors, Vendors, and any lower tiered level of Sub-Subcontractors and Vendors, may use the terms and conditions negotiated by the Energy Commission with UC for its subcontracts with UC.

In subcontracts with the Lawrence Livermore National Laboratory, Lawrence Berkeley National Laboratory, Sandia National Laboratories, the Contractor and its Subcontractors, Vendors, and any lower tiered level of Sub-Subcontractors and Vendors may use the terms and conditions negotiated with the California Department of General Services for these laboratories. For subcontracts to all other DOE national laboratories, the Contractor and its Subcontractors, Vendors, and any lower tiered level of Sub-Subcontractors and Vendors may use the terms and conditions negotiated by the Energy Commission with the Department of Energy. Please contact the Commission Agreement Officer for these terms.

- Standard of Performance (Section 3)
- Prevailing Wage (Section 12)
- Recordkeeping, Cost Accounting, and Auditing (Section 13)
- Conflicts of Interest (Section 16)
- Indemnification (Section 21)
- Pre-Existing and Independently Funded Intellectual Property (Section 23)
- Intellectual Property (Section 24)
- Royalty Payments to the Commission (Section 25)
- Access to Sites and Records (included in Section 26, “General Provisions”)
- Nondiscrimination (included in Section 27, “Certifications and Compliance”)
- Legal Statements on Deliverables (included in Section 6, “Deliverables”), unless the Subcontractor will not generate any Products.
- Travel and Per Diem (Section 10), unless the Subcontractor will not be reimbursed for travel by the Commission.
- Equipment (Section 15), unless the Subcontractor will not be reimbursed for equipment with Commission funds.
- Confidentiality (Section 22), unless the Subcontractor will not have access to or generate confidential information.
- Survival of the following sections:
 - Equipment (Section 15)
 - Recordkeeping, Cost Accounting, and Auditing (Section 13)
 - Indemnification (Section 21)
 - Pre-Existing and Independently Funded Intellectual Property (Section 22)
 - Intellectual Property (Section 24)
 - Royalty Payments to the Commission (Section 25)
 - Access to Sites and Records (included in Section 26, “General Provisions”)

Subcontracts with Subcontractors, Vendors, and any lower tiered level of Sub-Subcontractors and Vendors funded in whole or in part by this Agreement shall also include the following:

- A clear and accurate description of the material, deliverables, or services to be procured.
- A detailed budget and timeline.
- Provisions that allow for administrative, contractual, or legal remedies in instances of breach contract terms, in addition to sanctions and penalties as may be appropriate.
- Provisions for termination by the Contractor, including termination procedures and the basis for settlement.
- A statement that further assignments will not be made to any third or subsequent tier Sub-Subcontractor without obtaining the advance written consent of the Commission Agreement Manager and following the bidding procedures for selecting Subcontractors described in subsection (b) above.

Grants funded in whole or in part by this Agreement shall include language conforming to the provisions below:

- Standard of Performance (Section 3)
- Legal Statements on Deliverables (included in Section 6, “Deliverables”)
- Travel and Per Diem (Section 10)
- Prevailing Wage (Section 12)
- Recordkeeping, Cost Accounting, and Auditing (Section 13)
- Indemnification (Section 21)
- Confidentiality (Section 22)
- Pre-Existing and Independently Funded Intellectual Property (Section 23)
- Intellectual Property (Section 24)
- Royalty Payments to the Commission (Section 25)
- Access to Sites and Records (included in Section 26, “General Provisions”)
- Nondiscrimination (included in Section 27, “Certifications and Compliance”)
- Survival of the following sections:
 - Recordkeeping, Cost Accounting, and Auditing (Section 13)
 - Indemnification (Section 21)
 - Pre-Existing and Independently Funded Intellectual Property (Section 23)
 - Intellectual Property (Section 24)
 - Royalty Payments to the Commission (Section 25)
 - Access to Sites and Records (included in Section 26, “General Provisions”)

Grants funded in whole or in part by this Agreement shall also include the following:

- A clear and accurate description of the material, deliverables, or services to be procured.

- A detailed budget and timeline for Grants over \$150,000; a milestone budget and timeline for Grants of \$150,000 or less.
- Provisions that allow for administrative, contractual, or legal remedies in instances where Grantees breach Grant terms, in addition to sanctions and penalties as may be appropriate.
- Provisions for termination by the Contractor, including termination procedures and the basis for settlement (see Section 20 (Termination of Grants) for additional requirements).
- A statement that further assignments will not be made to any subsequent tier Grantee without obtaining the advance written consent of the Contractor.

k. Audits

All subcontracts and Grants entered into for the performance of this Agreement are subject to examination and audit by the Energy Commission and/or Bureau of State Audits for a period of three (3) years after payment of the Contractor's final invoice under this Agreement. The Energy Commission may audit subcontracts and Grants that are relevant to the Contractor's, Subcontractor's, Vendor's, and any lower tiered level of Sub-Subcontractor's and Vendor's, royalty payment obligations or the Grantee's royalty payments (see the "Royalty Payments to the Commission" section) for a period of ten (10) years after the Agreement's end date.

l. Copies of Subcontracts and Grants

The Contractor shall provide a copy of its subcontracts and Grants upon request by the Energy Commission.

m. Conflicting Subcontract Terms

Prior to the execution of this Agreement, the Contractor shall notify the Commission Agreement Manager of any known or reasonably foreseeable conflicts between this Agreement and its agreements with any Subcontractors, Vendors, and any lower tiered level of Sub-Subcontractors and Vendors (e.g., conflicting intellectual property or payment terms). If the Contractor discovers any such conflicts after the execution of this Agreement, it shall notify the Commission Agreement Manager of the conflict within fifteen (15) days of discovery. The Energy Commission may terminate this Agreement if any conflict impairs or diminishes this Agreement's value.

n. Conflicting Grant Terms

Prior to the execution of any Grant, the Contractor shall notify the Commission Agreement Manager of any known or reasonably foreseeable conflicts between this Agreement and its agreements with any Grantee (e.g., conflicting intellectual property or royalty payment terms). If the Contractor discovers any such conflicts after the execution of the Grant, it shall notify the Commission Agreement Manager of the conflict within fifteen (15) days of discovery. The Energy Commission may terminate this Agreement or require the Contractor to terminate its Grant if any conflict impairs or diminishes this Agreement's value.

o. Notice of Termination

The Contractor shall provide written notification to the Commission Agreement Manager and Commission Agreement Officer of the termination of any subcontract or lower tier subcontract with a Subcontractor, Vendor, and any lower tiered level of Sub-Subcontractors and Vendor, identified in the Agreement, immediately upon termination of the subcontract. The Contractor shall not terminate any Grant without prior written approval by the Commission (see Section 20 (Termination of Grants)).

p. Penalties for Noncompliance

Without limiting the Commission's other remedies, failure to comply with the above requirements may result in the termination of this Agreement.

9. Payment of Funds

The Energy Commission agrees to reimburse the Contractor in arrears for actual allowable expenditures incurred in accordance with this Agreement, including the budget. But see Section 7.c. and d. above in this Exhibit D for some available flexibility. All work and expenditure of funds (Commission-reimbursed and/or match share) must occur within the Agreement term specified on the Agreement signature page (form STD 213).

a. Conditions for Payment

- 1) **Actual, allowable expenses:** The Contractor may only bill for expenses incurred at its actual direct labor, fringe benefit, and indirect rates. For Grants of \$150,000 or less, the Contractor may bill for labor expenses incurred under the milestone payment basis. See subsection (b) for a discussion of allowable and unallowable costs.
- 2) **Advance payment:** Except as provided below in subsection 3), below, no payment will be made in advance of services rendered or expenses incurred, unless prior written approval has been obtained by the Contracts, Grants, and Loans Office, which may impose conditions on such payments. Otherwise, payments will be made on a reimbursement basis for the Contractor's expenditures (i.e., after the Contractor has paid for a service, deliverable, supplies, or other approved budget item).
- 3) **Incurred Costs:** The Commission will provide payment to the Contractor for Incurred Costs that are (1) incurred during the Agreement Term; (2) invoiced within the required timeframes of this Agreement; (3) made in accordance with the Agreement's Budget; and (4) actual and allowable expenses under this Agreement.

The Contractor shall pay ALL Incurred Costs for which it has invoiced the Commission within 14 calendar days of receiving payment under this Agreement for the Incurred Costs. The Contractor shall only invoice the Commission for Incurred Costs the Contractor will pay within 14 calendar days of receiving payment.

For any Incurred Costs for which the Contractor received funds from the Commission and does not pay within 14 calendar days, the Contractor shall on the very next business day after the 14 calendar days submit repayment of the unpaid amount back to the Commission. Repaid funds will be placed back into the Agreement and will be available to reimburse

allowable costs in accordance with this Agreement. When making a repayment under this provision, the Contractor shall specify "Repayment of Unspent Funds under Agreement [insert agreement number]." Contractor shall remit the repayment to:

California Energy Commission
Accounting Office
715 P Street
Sacramento, CA 95814

This repayment requirement of the Contractor is in addition to any other rights the Commission can enforce relative to this Agreement. Contractor agrees and acknowledges that time is of the essence in paying Incurred Costs and submitting repayments, and the Commission can treat the Contractor's breach of either requirement as a material breach. Contractor can contact the Commission Agreement Manager for any questions about the logistics of making repayments.

- 4) **Frequency of payment requests:** Unless otherwise specified in the Agreement, the Contractor may request payment from the Energy Commission at any time during the Agreement term. However, it is preferred that payment requests be submitted with the progress reports.
- 5) **Invoice Approval and Disputes:** Each request for payment is subject to the Commission Agreement Manager's approval. Payments will be made to the Contractor for undisputed invoices. An undisputed invoice is an invoice submitted by the Contractor for work performed, for which project expenditures, products and deliverables meet all Agreement conditions, and for which additional evidence is not required to determine its validity. The invoice will be disputed if all deliverables and products due for the billing period have not been received and approved, if the invoice is inaccurate, or if it does not comply with the terms of this Agreement. If the invoice is disputed, the Contractor will be notified via a Dispute Notification Form within fifteen (15) working days of the Commission Agreement Manager's receipt of the invoice.
- 6) **Contractor's headquarters:** For purposes of payment, the Contractor's headquarters is the location of the Contractor's office where the majority of its employees assigned responsibilities for this Agreement are permanently assigned.
- 7) **Deadlines:** The final invoice must be received by the Energy Commission no later than thirty (30) calendar days after the Agreement end date.
- 8) **Prompt Payment:** The Energy Commission will make payments in accordance with the Prompt Payment Act (California Government Code Section 927 et seq.), which requires payment of properly submitted, undisputed invoices within 45 days of receipt or the automatic payment of late penalties.
- 9) **Expiration of Fiscal Year Funding:** If a funding source for this Agreement expires prior to the end date of the Agreement, the Contractor must submit all deliverables, products, and invoices to the Commission at least two months prior to the expiration date in order to receive payment from the source. For example, if the funding source expires on June 30,

2020, the Contractor must submit all deliverables, products, and invoices to the Energy Commission by April 30, 2020 to receive payment from the source.

- 10) **Multiple Non-Energy Commission Funding Sources:** No payment will be made for costs identified in Contractor invoices that have or will be reimbursed by another source, including but not limited to an agreement with another government entity.
- “Government Entity” means: (1) a state governmental agency; (2) a state college or university; (3) a local government entity or agency, including those created as a Joint Powers Authority; (4) an auxiliary organization of the California State University or a California community college; (5) the federal government; (6) a foundation organized to support the Board of Governors of the California Community Colleges; and (7) an auxiliary organization of the Student Aid Commission established under California Education Code Section 69522.
- 11) **Reduced funding:** If the Energy Commission does not receive sufficient funds under the Budget Act or from the investor-owned utility administrators of the EPIC program to fully fund the work identified in Exhibit A (Scope of Work), the following will occur:
- a) If the Energy Commission has received a reduced amount of funds for the work, it may: (1) offer an Agreement amendment to the Contractor to reflect the reduced amount; or (2) cancel this Agreement (with no liability occurring to the State).
 - b) If the Energy Commission has received no funds for the work identified in Exhibit A: (1) this Agreement will be of no force and effect; (2) the State will have no obligation to pay any funds to the Contractor; and (3) the Contractor will have no obligation to perform any work under this Agreement.

b. Allowability of Costs

1) Allowable Costs

The costs for which the Contractor will be reimbursed under this Agreement include all costs, direct and indirect, incurred in the performance of the work identified in the Scope of Work. Costs must be incurred within the Agreement term. Factors to be considered in determining whether an individual item of cost is allowable include: (i) reasonableness of the item, including necessity of the item for the work; (ii) applicable federal cost principles or acquisition regulations incorporated by reference in Section 2 of this Agreement; and (iii) the terms and conditions of this Agreement. The Commission has sole discretion in determining whether reimbursement of any claimed cost is allowable.

2) Unallowable Costs

Below are examples of unallowable costs. Details concerning the allowability of costs are available from the Energy Commission’s Accounting Office.

- a) Contractor profit, fees, or mark-ups on any subcontracted budget

item (including subcontracts of any tier). Subcontractors that receive funding under this Agreement may not charge profit for their Subcontractors' costs. Grantees that receive funding under this Agreement may not charge profit or mark-ups.

- b) Contingency costs;
 - c) Imputed costs (e.g., cost of money);
 - d) Fines and penalties;
 - e) Losses;
 - f) Excess profit taxes;
 - g) Unapproved, increased rates and fees for this Agreement; and
 - h) Grantee reimbursable and match expenses incurred prior to Commission approval of the Grant.
- 3) Except as provided for in this Agreement or applicable California law or regulations, the Contractor will use the federal cost principles and/or acquisition regulations incorporated by reference in Section 2 of this Agreement when determining allowable and unallowable costs. In the event of a conflict, this Agreement takes precedence over the federal cost principles and/or acquisition regulations.
- 4) Budget Reallocations
(Please refer to Section 7, especially parts c. and d., above in this Exhibit D.)

c. Payment Request Format

The Contractor shall submit payment requests using the invoice template provided by the Commission Agreement Manager, which may be modified from time to time.

- 1) Grantee invoices for Grants of \$150,000 or less shall require no more than the following items: agreement number (and work authorization number, if applicable); Date prepared; Grantee's Federal tax ID number; billing period; operating expenses, including travel, equipment, materials, and other; by budget line item (cost component) category, the budgeted amount, amount billed to date, currently billed amount, balance of funds; match fund expenditures (if applicable); receipts for travel (including departure and return times), equipment, materials, and miscellaneous; and documentation of the milestones achieved to account for labor expenditures.

The Commission will accept computer-generated or electronically transmitted invoices without backup documentation provided that the Contractor mails a hard copy the same day.

The Contractor must submit all invoices to the following address:

California Energy Commission
Accounting Office
715 P Street
Sacramento, CA 95814

d. Rounding

Contractor, Subcontractors, Grantees, and each lower-tiered level of Sub-Subcontractors shall round invoiced amounts to the nearest cent (\$0.01) using standard rounding, which is rounding down for \$0.000 through \$0.004, and rounding up for \$0.005 through \$0.009. Rounding cannot be used to exceed the amount in any Budget Category (beyond what is allowed by Section 7.c. or d. above in this Exhibit D) or exceed the total Agreement amount.

e. Certification

The Contractor's authorized officer must sign the certification provided by the Commission Agreement Manager in the Invoice Template and include the certification with its payment request. The Commission Agreement Manager can change this certification without amending this Agreement.

f. Fringe Benefit, Indirect Overhead, General and Administrative (G&A), and Facilities and Administration (F&A) Rates

Indirect cost rates must be developed in accordance with generally accepted accounting principles and the applicable federal cost principles or acquisition regulations (see the provisions incorporated by reference in Section 2). If the Contractor has an approved fringe benefits or indirect cost rate (indirect overhead, G&A, or F&A) from its cognizant federal agency, the Contractor may bill at the federal rate up to the budget rate caps if the following conditions are met:

- The Contractor may bill at the federal provisional rate but must adjust annually to reflect its actual final rates for the year in accordance with the Labor, Fringe, and Indirect Invoicing Instructions contained in the budget (Exhibit B, Attachment 1).
- The cost pools used to develop the federal rates must be allocable to the Agreement, and the rates must be representative of the portion of costs benefiting the Agreement. For example, if the federal rate is for manufacturing overhead at the Contractor's manufacturing facility and the Agreement is for research and development at the Contractor's research facility, the federal indirect overhead rate would not be applicable to the Agreement.
- The federal rate must be adjusted to exclude any costs that are specifically prohibited in the Agreement.
- The Contractor may only bill up to the Agreement budget rate caps, unless and until an amendment to the budget is approved.

g. Retention

It is the Commission's policy to retain ten percent (10%) of any payment request or of the total Commission award at the end of the project. After the project is complete, the Contractor must submit a completed payment request form requesting release of the retention. The Commission Agreement Manager will review the project file and authorize release of the retention when satisfied that the terms of the Agreement have been fulfilled.

Retention may be released upon completion of tasks that are considered separate and distinct (i.e., the task is a stand-alone piece of work and could be

completed without the other tasks). But, the Commission will not release retention for Agreement tasks for administration or management of the Agreement and/or Subcontractors. The tasks for which retention may be released prior to the end of the Agreement must be identified in Exhibit B (budget). No retention will be withheld for payment requests that will reimburse Grantees since the payments to Grantees are for grants and not for services rendered to the State.

10. Travel and Per Diem

- a. Travel not listed in Exhibit B, Budget, can be added without an amendment via Commission Agreement Manager approval. Approval can come in one of two forms: written authorization from the Commission Agreement Manager prior to the Contractor taking the trip, or through the invoice review. Outside of a budget reallocation, additional travel requests are submitted using the Commission's [Travel Form](#). As explained in section 7.c. above in these terms, such changes are not considered a "variation of the terms" in the incorporated GTC 610, section 2, or other change that would require an amendment to this Agreement.

Contractor understands, however, that any travel taken that is not listed in Exhibit B, the Budget, or not pre-approved by the Commission Agreement Manager in writing, is at the Contractor's own financial risk. The Commission Agreement Manager might not approve the trip as part of invoice review. The Contractor cannot invoice and be paid for more than the total amount in the Travel Budget Category except as explained in section 7 above in these terms or for more than the total Agreement amount without an amendment.

- b. The Contractor will be reimbursed for authorized travel and per diem up to, but not to exceed, the rates allowed nonrepresented state employees. Current allowable travel reimbursement rates can be obtained from the Commission's web site at http://www.energy.ca.gov/contracts/TRAVEL_PER_DIEM.PDF.
 - 1) No reimbursement for food or beverages will be made other than for allowable per diem charges.
 - 2) The Commission will not reimburse any expenses under this Agreement for alcoholic beverages. In addition, the daily per diem is for the individual expenses of those traveling and working on the Agreement only. It cannot be used to pay for expenses of others (e.g., it cannot be used to buy a meal for someone else).
- c. The Contractor shall ensure that its Subcontractors, Vendors, any lower-tiered level of Sub-Subcontractors and Vendors, and Grantees also comply with the travel and per diem requirements above, including by ensuring all agreements contain the above terms regarding reimbursement.

11. Disabled Veteran Business Enterprise (DVBE) Requirements

The following terms apply to the Contractor and its Subcontractors, Vendors, and any lower-tiered level of Sub-Subcontractors and Vendors, but not to Grants because Grants are not state service contracts, and the DVBE requirements do not apply to state grants.

a. Identification and Use of DVBEs

“Disabled Veteran Business Enterprise” means a business that is certified by the California Department of General Services as meeting the requirements in California Military and Veterans Code Section 999(b)(7).

If the Contractor made a commitment to achieve DVBE participation for this Agreement, it shall identify each DVBE that will perform work under this Agreement in Exhibit B (budget). As the award of this Agreement is based in part on the Contractor’s DVBE commitment, the Contractor shall use each identified DVBE for work under this Agreement. Work performed that falls under the Vendor category or Materials and Miscellaneous category by entities that are certified as DVBE shall count towards the DVBE participation commitment.

b. Reporting

The Contractor shall certify the following in a report to the Commission Agreement Officer, within sixty (60) days of receiving final payment under the Agreement:

- 3) The total amount the Contractor received under the Agreement for itself, its Subcontractors, its Vendors, and any lower-tiered level of Sub-Subcontractors and Vendors but not for Grants;
- 4) The name and address of the DVBE(s) that participated in the performance of the Agreement;
- 5) The amount that each DVBE received from the Contractor;
- 6) That all payments under the Agreement have been made to the DVBEs; and
- 7) The actual percentage of DVBE participation that was achieved.
- 8) In accordance with California Military and Veterans Code Section 999.5(d), a person or entity that knowingly provides false information will be subject to a civil penalty for each violation.

c. Replacement of a DVBE Subcontractor or Vendor

In accordance with California Military and Veterans Code Section 999.5(e), a DVBE Subcontractor, Vendor, or any and any lower-tiered level of Sub-Subcontractors and Vendors may only be replaced by another DVBE and must be approved by the California Department of General Services. A Vendor may replace a Subcontractor and vice versa. If the Contractor believes that an identified DVBE must be replaced, it must inform the Commission Agreement Manager and Commission Agreement Officer in writing of the reason for the DVBE replacement.

If the DVBE is replaced, the Contractor will complete revised certification forms (provided by the Commission Agreement Officer) that identify the new DVBE, and the Agreement will be amended as specified in Section 7.

d. Grounds for Termination, Damages, and Penalties

Without limiting the Commission’s available remedies, the Contractor’s failure to adhere to its committed DVBE participation level or to the requirements of this section may be cause for termination of the Agreement, recovery of damages,

and/or penalties as outlined in California Military and Veterans Code Section 999.9 and Public Contract Code Section 10115.10.

e. Certification of DVBE participation.

Contractor agrees to certify on “Prime Contractor’s Certification DVBE Subcontractor Report” (Form STD 817) that DVBE subcontractor participation under this agreement is in compliance with the goals specified at the time of award of contract or with any subsequent amendment. If for this Contract the Contractor made a commitment to achieve the DVBE participation goal, the Department will withhold \$10,000 from the final payment, or the full final payment if less than \$10,000, until the Contractor complies with the certification requirements of Military and Veterans Code Section 999.5. A Contractor that fails to comply with the certification requirement shall, after notice, be allowed to cure the defect. Notwithstanding any other law, if, after at least 15 calendar days but not more than 30 calendar days from the date of notice, the prime contractor refuses to comply with the certification requirements, the department shall permanently deduct \$10,000 from the final payment, or the full payment if less than \$10,000. The Contractor shall provide proof of payment for the work performed by the DVBE subcontractor(s) upon Department’s request.

12. Prevailing Wage

a. Requirement

Projects funded by the Energy Commission often involve construction, alteration, demolition, installation, repair, or maintenance work over \$1,000. Such projects might be considered “public works” under the California Labor Code (See California Labor Code Section 1720 et seq. and Title 8 California Code of Regulations, Section 16000 et seq.). Public works projects require the payment of prevailing wages. Prevailing wage rates can be significantly higher than non-prevailing wage rates.

b. Determination of Project’s Status

Only the California Department of Industrial Relations (DIR) and courts of competent jurisdiction may issue legally binding determinations that a particular project is or is not a public work. If the Contractor is unsure whether the project funded by the Agreement is a “public work” as defined in the California Labor Code, it may wish to seek a timely determination from DIR or an appropriate court. As such processes can be time consuming, it may not be possible to obtain a timely determination before the date of performance of the Agreement.

By accepting this Agreement, the Contractor is fully responsible for complying with all California public works requirements, including but not limited to payment of prevailing wage. As a material term of this Agreement, the Contractor must either:

- 1) Timely obtain a legally binding determination from DIR or a court of competent jurisdiction before work begins on the project that the proposed project is not a public work; or
- 2) Assume that the project is a public work and ensure that:
 - Prevailing wages are paid unless and until DIR or a court of competent jurisdiction determines that the project is not a public

work;

- The project budget for labor reflects these prevailing wage requirements; and
- The project complies with all other requirements of prevailing wage law, including but not limited to keeping accurate payroll records and complying with all working hour requirements and apprenticeship obligations.

California Prevailing Wage law provides for substantial damages and financial penalties for failure to pay prevailing wages when such payment is required.

c. Subcontractors/Grantees and Flow-down Requirements

The Contractor shall ensure that its Subcontractors, Vendors, any lower-tiered level of Sub-Subcontractors and Vendors, and Grantees also comply with the public works/prevailing wage requirements above. The Contractor will ensure that all agreements with its Subcontractors, Vendors, any lower-tiered level of Sub-Subcontractors and Vendors, and Grantees under this Agreement contain terms regarding payment of prevailing wages on public works projects that reflect the terms of this Section 12, including the indemnification in part d. The Contractor is responsible for any failure of its Subcontractors, Vendors, any lower-tiered level of Sub Subcontractors and Vendors, or Grantees to comply with California prevailing wage and public works laws.

d. Indemnification and Breach

Any failure of the Contractor, its Subcontractors, Vendors, any lower-tiered level of Sub-Subcontractors and Vendors, or Grantees to comply with the requirements in this Section 12 will constitute breach of this Agreement, which allows the Commission to take any actions, seek any remedies, or exercise any rights available to it, including excusing the Commission's performance of this Agreement at the Commission's option, and will be at the Contractor's sole risk. In such a case, the Commission may refuse payment to the Contractor of any amount under this Agreement and the Commission will be released, at its option, from any further performance of this Agreement or any portion thereof. The Contractor shall indemnify the Energy Commission and hold it harmless for any and all financial consequences arising out of or resulting from the failure of the Contractor, its Subcontractors, Vendors, any lower-tiered level of Sub-Subcontractors and Vendors, or Grantees to pay prevailing wages or to otherwise comply with the requirements of prevailing wage law.

e. Budget

The Contractor's budget on public works projects must indicate which job classifications are subject to prevailing wage. For detailed information about prevailing wage and the process to determine if the proposed project is a public work, the Contractor may wish to contact the California Department of Industrial Relations (DIR) or a qualified labor attorney for guidance.

f. Covered Trades

For public works projects, the Contractor may contact DIR for a list of covered trades and the applicable prevailing wage.

g. Questions

If the Contractor has any questions about this contractual requirement or the wage, recordkeeping, apprenticeship, or other significant requirements of California prevailing wage law, the Contractor should consult DIR and/or a qualified labor attorney before entering into this Agreement.

h. Certification

The Contractor shall certify to the Energy Commission on each payment request form either that: (a) prevailing wages were paid to eligible workers who provided labor for work covered by the payment request and the Contractor, Subcontractors, Vendors, any lower-tiered level of Sub-Subcontractors and Vendors, and Grantees otherwise complied with all California prevailing wage laws; or (b) the project is not a public work requiring the payment of prevailing wages. In the latter case, the Contractor will provide competent proof of a DIR or court determination that the project is not a public work requiring the payment of prevailing wages.

Prior to the release of any retained funds under this Agreement, the Contractor will submit to the Energy Commission the above-described certificate signed by the Contractor and all Subcontractors, Vendors, any lower-tiered level of Sub-Subcontractors and Vendors, and Grantees performing public works activities on the project. Absent this certificate, the Contractor will have no right to any funds under this Agreement, and the Commission will be relieved of any obligation to pay any funds.

13. Recordkeeping, Cost Accounting, and Auditing

a. Cost Accounting

The Contractor shall keep separate, complete, and correct accounting of the costs involved in completing the project and any match-funded portion of the project. The Commission or its agent will have the right to examine the Contractor's books of accounts at all reasonable times, to the extent necessary to verify the accuracy of the Contractor's reports.

b. Retention of Records

The Contractor shall retain all project records (including financial records, progress reports, and payment requests) for a minimum of three (3) years after the final payment has been received, unless otherwise specified in the Agreement.

c. Accounting Procedures

The costs of the Contractor, Subcontractors, and Grantees for awards over \$150,000 will be determined on the basis of their respective accounting system procedures and practices employed as of the effective date of this Agreement, provided that each uses generally accepted accounting principles and cost reimbursement practices. The Contractor's cost accounting practices used in accumulating and reporting costs during the performance of this Agreement will be consistent with the practices used in estimating costs for any proposal to which this Agreement relates; provided that such practices are consistent with the other terms of this Agreement and that such costs may be accumulated and reported in greater detail during performance of this Agreement.

The Contractor's accounting system must distinguish between direct and indirect

costs, and Contractor and Grantee costs. All costs incurred for the same purpose, in like circumstances, are either direct costs only or indirect costs only with respect to costs incurred under this Agreement.

Grantees for awards of \$150,000 or less are required to submit invoices based on a milestone payment basis. These Grantees are not required to maintain cost accounting practices, but costs must be reasonable and allowable.

d. Audit Rights

The Contractor shall maintain books, records, documents, and other evidence, based on the procedures set forth above, sufficient to reflect properly all costs claimed to have been incurred in the performance of this Agreement, including costs claimed for Grantees. The Energy Commission, another state agency, and/or a public accounting firm designated by the Energy Commission may audit the Contractor's accounting records at all reasonable times, with prior notice by the Energy Commission.

It is the intent of the parties that the audits will ordinarily be performed not more frequently than once every twelve (12) months during the performance of the work and once at any time within three (3) years after payment by the Energy Commission of the Contractor's final invoice. However, performance of any such interim audits by the Energy Commission does not preclude further audit. The Energy Commission may audit books, records, documents, and other evidence relevant to the Contractor's royalty payment obligations or Grantee's royalty payment obligations (see Section 25 (Royalty Payments to the Commission)) for a period of ten (10) years after payment of the Contractor's final invoice.

The Contractor shall allow the auditor(s) to access such records during normal business hours, and will allow interviews of any employees who might reasonably have information related to such records. The Contractor will include a similar right of the state to audit records and interview staff in any subcontract or Grant related to the performance of this Agreement.

Audits of Grants of \$150,000 or less will take into account the payment of invoices based on milestone payment basis and audit for completion of milestones for labor expenditures rather than for full cost-based accounting. Costs must be reasonable and allowable.

e. Refund to the Energy Commission

If the Energy Commission determines that any invoiced and paid amounts exceed the actual allowable incurred costs, the Contractor shall repay the amounts to the Energy Commission within thirty (30) days of request or as otherwise agreed by the Energy Commission and the Contractor. If the Energy Commission does not receive such repayments, it will be entitled to take any actions, seek any remedies, or exercise any rights available to it, such as withholding further payments to the Contractor and seeking repayment from the Contractor.

f. Audit Cost

The Contractor shall bear its cost of participating in any audit (e.g., mailing or travel expenses). The Energy Commission will bear the cost of conducting the audit unless the audit reveals an error detrimental to the Energy Commission that exceeds more than ten percent (10%) or \$5,000 (whichever is greater) of: (1) the

amount audited; or (2) if a royalty audit, the total royalties due in the period audited. The Contractor shall pay the refund as specified in subsection (e), and shall reimburse the Energy Commission for reasonable costs and expenses incurred by the Commission in conducting the audit.

g. Match or Cost Share

If the budget includes a match share requirement, the Contractor's commitment of resources, as described in this Agreement, is typically required in advance of or concurrently with receipt of Energy Commission funds.

The Commission Agreement Manager, in writing and with Supervisor approval, may authorize Contractor to spend Commission funds in advance of Match Funds pursuant to a [Match Fund Spending Plan](#). The Plan must estimate how Match Funds and Commission funds will be spent over each quarter and briefly explain why it is not practical to spend Match Funds concurrent with Commission Funds. While these terms allow additional flexibility, the Contractor agrees to spend the agreed match funds as soon as practicable during the Agreement in order to resume proportionality between Commission funds and Match funds spent.

The Contractor shall maintain accounting records detailing the expenditure of the match (actual cash and in-kind, non-cash services), and report on match share expenditures on its request for payment.

14. Permits and Clearances

The Contractor is responsible for ensuring that all necessary permits and environmental documents are prepared and that clearances are obtained from the appropriate agencies.

15. Procurement of Equipment. Materials Miscellaneous

a. Title and Disposition

The Energy Commission has title to equipment acquired by the Contractor and Subcontractors, Vendors, any lower-tiered level of Sub-Subcontractors and Vendors, in whole or in part with Energy Commission funds. The Contractor and Subcontractors, Vendors, any lower-tiered level of Sub-Subcontractors and Vendors, may not sell, lease, or encumber the property (e.g., place a legal burden on the property such as a lien) without the Commission Agreement Manager's prior written approval.

Upon termination of the Agreement, the Energy Commission may:

- 1) Authorize the continued use of the equipment to further project goals; or
- 2) Request delivery of the equipment to the Energy Commission at the Commission's expense.

The Contractor may refer to the applicable federal regulations incorporated by reference in this Agreement for guidance regarding additional equipment requirements.

b. Financing Statement

The Commission Agreement Officer will file a Uniform Commercial Code (UCC.1) Financing Statement with the California Secretary of State's Office for equipment

purchased by the Contractor with Agreement funds. Invoices for such equipment will not be processed until the statement has been filed.

c. Liability

The Contractor shall assume all risk for maintenance, repair, destruction, and damage to the equipment while it is in the Contractor's possession or is subject to its control. The Contractor is not required to repair or replace equipment that is intended as part of the project to undergo significant modification or testing to the point of damage or destruction.

d. Purchase of Equipment by Grantee

As between the Energy Commission, Contractor, and Grantees, legal title to equipment acquired by the Grantee with grant funds shall vest in the Grantee. With the exception of pre-existing UCC-1 blanket liens, the Grantee shall not further encumber or sell the equipment except for the sole purpose of using the proceeds of such sale or encumbrance for the direct benefit of the Grant funded by this Agreement. In such circumstance, the Grantee shall provide written notice to the Contractor of such proposed sale or encumbrance at least 30 days in advance of any sale or encumbrance, stating the purpose of the sale or encumbrance, and specifying how the proceeds of the sale or encumbrance will be used.

Contractor shall ensure that Grants contain terms indicating that during the term of the Grant, the Grantee shall use the equipment for the Grant for which it was acquired. The Grantee shall be solely responsible for the possession, use, storage, and maintenance of the equipment, for maintaining appropriate insurance on the equipment sufficient to cover its replacement value in case of loss, and for complying with any environmental laws applicable to the Equipment.

The Contractor shall not hold any interest in equipment acquired by the Grantee for the purpose of the Grant. The Contractor shall ensure all agreements with its Grantees contain the above terms regarding equipment purchased by the Grantee.

e. New Items under Materials and Miscellaneous, and Equipment

(Please see Section 7.e. above in this Exhibit D.)

16. Conflicts of Interest

a. Potential or Actual Conflicts of Interest

The Contractor represents that it is familiar with California conflict of interest laws, and agrees to comply with those laws in performing this Agreement (e.g., Gov. Code § 81000 et seq., and Gov. Code § 1090 et seq.). The Contractor certifies that, as of the effective date of this Agreement, it was unaware of any facts constituting a conflict of interest. The Contractor shall avoid all conflicts of interest in performing this Agreement, including in selecting Grants to recommend to the Energy Commission for funding.

The Contractor shall continuously review new and upcoming projects in which members of its team may be involved for potential conflicts of interest. The Contractor shall inform the Commission Agreement Manager as soon as a

question arises about whether a conflict may exist. The Commission's Chief Counsel's Office and the Commission Agreement Manager will determine what constitutes a potential or actual conflict of interest. Without limiting any of its other available rights, remedies, or actions, the Energy Commission reserves the right to redirect work and funding if the Chief Counsel's Office determines that there is a potential or actual conflict of interest.

Contractors and all Subcontractors, Vendors, any lower-tiered level of Sub-Subcontractors and Vendors, involved in planning, developing, soliciting bids, scoring, negotiating, or executing an agreement with a Grantee pursuant to this contract shall not negotiate, make arrangements, or enter into any other agreement or working relationship with a Grantee in which the Contractor or Subcontractor, Vendors, any lower-tiered level of Sub-Subcontractors and Vendors, receives payment from the Grantee until the Grantee's agreement under the CalSEED Program has ended.

If such an agreement or working relationship began prior to and exists at the start of the Grantee's agreement under the CalSEED Program, the Contractor, Subcontractor, Vendor, and any lower-tiered level of Sub-Subcontractor and Vendor, shall complete the agreement or working relationship as soon as possible. And during the pendency of the pre-existing agreement or working relationship, the Contractor or Subcontractor shall not score applications or participate in the creation of an agreement under the CalSEED Program with any applicant or Grantee with whom the pre-existing agreement or relationship exists.

In addition, a TAC member shall not score applications or participate in the creation of an agreement under the CalSEED Program with any applicant or Grantee with whom the TAC member has a pre-existing agreement or working relationship.

b. **Appearances of Conflicts of Interest**

The Contractor acknowledges that in governmental contracting even the appearance of a conflict of interest can be harmful to the interest of the State. Thus, the Contractor agrees to refrain from any practices, activities, or relationships that appear to conflict with the Contractor's obligations under this Agreement, unless the Contractor receives prior written approval of the Commission. In the event the Contractor is uncertain whether the appearance of a conflict of interest may exist, the Contractor shall submit to the Commission Agreement Manager a written description of the relevant details.

c. **Rules Regarding Current and Former Energy Commission Employees**

Please see the CONFLICT of INTEREST provision in the Contractor Certification Clauses (CCC 307) incorporated by reference into these terms from the Department of General Services' required terms (GTC 610), which are also incorporated by reference in Exhibit C.

d. **Economic Interest Statement Requirement**

The California Political Reform Act requires individuals holding positions designated within an agency's conflict of interest code to file a Statement of Economic Interests (Form 700) at certain times. The Energy Commission's conflict of interest code designates "consultants" among the positions that must

file a Form 700 (see Title 20 California Code of Regulations §§2401 and 2402).

The Energy Commission considers all of the Contractor's and Subcontractors' (and all levels of lower-tiered Sub-Subcontractors) employees working on (providing labor) on Subtasks 1.5, Project Meetings and Briefings, Subtask 1.7, Annual Reports, Subtask 1.8, Final Report, Subtask 1.9, Final Meeting and Technical Tasks 2 through 7 to be "consultants" and requires them to file an original Form 700 with the Energy Commission. (See Government Code Sections 82019 and 87302). Employees solely working on Task 1, other than Subtasks 1.5, Project Meetings and Briefings, Subtask 1.7, Annual Reports, Subtask 1.8, Final Report and Subtask 1.9, Final Meeting do not have to fill out Form 700's unless directed to do so by the Energy Commission. The Energy Commission reserves the right to have anyone working under this Agreement fill out Form 700's.

Each of the Contractor's and Subcontractors' (and all levels of lower-tiered Sub-Subcontractors) employees performing work (labor) under the Agreement on Subtasks 1.5, Project Meetings and Briefings, Subtask 1.7, Annual Reports, Subtask 1.8, Final Report, Subtask 1.9, Final Meeting and Technical Tasks 2 through 7 or as directed by the Energy Commission must file a Form 700 within the required timeframes, which include the following:

- Assuming Office Statement. Must be filed within 30 days of beginning work under the Agreement. Beginning work means when the employee actually performs work under the Agreement; it does not mean the start date of the Agreement unless the employee starts work on the start date.
- Annual Statement. Must be filed annually, no later than April 1.
- Leaving Office Statement. Must be filed within 30 days of ceasing to perform work under the Agreement (e.g., removed as a Subcontractor, completion of assigned tasks) or within 30 days after the Agreement ends.

Please note that not filing the Form 700 when required can result in automatic daily fines and other consequences.

Consultants for the Energy Commission must "disclose pursuant to the broadest disclosure category in the code" unless the Executive Director determines a lesser disclosure category applies (see 20 California Code of Regulations § 2402(a)). The Energy Commission's broadest disclosure category is 1, which requires:

- Designated positions assigned to this category must report all interest in real property, sources of income, including receipt of gifts, loans, and travel payments, and investments and business positions in business entities. (20 California Code of Regulations § 2402(b))

Upon request of the Contractor, the Energy Commission will determine whether a more narrow disclosure category is appropriate given the duties to be performed.

File all original Form 700's in person at, or by mail to, the following address (e-mails and faxes are not acceptable):

Energy Commission Filing Officer – Form 700 Filing
Selection, Training & Equal Employment Opportunity Office

e. Prohibition on Participating in Energy Commission Funding Opportunities

Under this Agreement, the Contractor and its Subcontractors will assist the Energy Commission in developing competitive solicitations and scoring applications. Accordingly, the Contractor, Subcontractors, all levels of lower-tiered Sub-Subcontractors, and individuals identified as consultants are prohibited from participating and agree not to participate (e.g., as an applicant, Subcontractor, or match-funding partner) in any Energy Commission solicitation or funding opportunity for which work is done under this Agreement.

In addition to being contractually bound by this provision, Contractor acknowledges and understands that because of its participation in this Agreement, the separate restrictions under Public Contract Code Section 10365.5 also prohibit it, and its Subcontractors, and all levels of lower-tiered Sub-Subcontractors, in certain circumstances, from performing related future work.

California Public Contract Code Section 10365.5 states: "no person, firm, or subsidiary thereof that has been awarded a consulting services contract may submit a bid for, nor be awarded a contract for, the provision of services, the procurement of goods or supplies, or any other related action that is required, suggested, or otherwise deemed appropriate in the end product of the consulting services contract." "Consulting services contract" is defined in California Public Contract Code Section 10335.5.

This restriction does not apply to any person, firm, or subsidiary thereof that has been awarded a subcontract of a consulting services contract that amounts to no more than ten percent (10%) of the total monetary value of the consulting services contract.

f. Contractor will flow-down these terms to ensure compliance from Subcontractors and all levels of lower-tiered Sub-Subcontractors.

17. Disputes

In the event the Contractor has a dispute or grievance regarding this Agreement, the Contractor shall utilize the following dispute resolution procedures. The Contractor shall continue with its responsibilities under this Agreement during any dispute.

Energy Commission Dispute Resolution Level 1

The Contractor shall first discuss the problem informally with the Commission Agreement Manager. If the problem cannot be resolved at this stage, the Contractor shall direct the grievance together with any evidence, in writing, to the Commission Agreement Officer. The Contractor's written grievance must state the issues in the dispute, the legal authority or other basis for the Contractor's position and the remedy sought. The Contractor shall bear the burden of establishing the factual, legal and equitable merit of its position. The Commission Agreement Officer and the Program Office Manager will make a determination on the problem within ten (10) working days after receipt of the written communication from the Contractor. If the dispute is complex, the Commission Agreement Officer may for good cause extend his or her time for response, not to exceed an additional ten (10) working days. The Commission Agreement Officer shall respond in writing to the Contractor, indicating a decision supported by reasons. Should the Contractor disagree with the Commission Agreement

Officer's decision, the Contractor may appeal to the second level.

Energy Commission Dispute Resolution Level 2

If the Contractor is not satisfied with the decision at Level 1, the Contractor shall submit a letter to the Executive Director indicating why the Commission Agreement Officer's decision is incorrect or unacceptable. Contractor shall attach to it the Contractor's original statement of the dispute with supporting documents, along with a copy of the Commission Agreement Officer's response. This letter shall be sent to the Executive Director at the Energy Commission within ten (10) working days from receipt of the Commission Agreement Officer's decision. If the dispute is complex, the Executive Director or designee may for good cause extend the time for Contractor's response, not to exceed an additional ten (10) working days. A written decision signed by the Executive Director or designee shall be returned to the Contractor within twenty (20) working days of receipt of the Contractor's letter. If the dispute is complex, the Executive Director or designee may for good cause extend the time for the Executive Director's response, not to exceed an additional ten (10) working days. The Executive Director or designee may in his or her sole discretion meet with one or more mutually-agreed representative(s) of the Contractor to review the issues. If the Executive Director decides to meet with the Contractor's representative(s), the parties shall mutually agree to extend the Executive Director's time to provide a written response pending completion of the discussions. Alternatively, the Executive Director may in his or her discretion exercise the option of referring Contractor's dispute to the Energy Commission at a publicly-scheduled business meeting.

Energy Commission Dispute Resolution Level 3

Should the Contractor disagree with the Executive Director's decision, the Contractor may appeal to the Energy Commission at a publicly-scheduled business meeting. Contractor shall state in writing the issues in the dispute, the Contractor's position, the factual and legal authority for the Contractor's position, the remedy sought, and shall attach a legible copy of all documents submitted by both parties at the Level 1 and Level 2 stages. Contractor will be provided with the current procedures for placing the written appeal on an Energy Commission Business Meeting Agenda, and Contractor shall follow said procedures.

18. Stop Work

The Commission Agreement Officer may, at any time by written notice to the Contractor, require the Contractor to stop all or any part of the work tasks in this Agreement. The Commission Agreement Officer may also, at any time by written notice to the Contractor, require the Contractor to stop all or any part of a Grantee's work in the Grant. Stop work orders may be issued for any reason including, but not limited to, the breach or apparent breach of any term of this Agreement, the project actually or potentially exceeding budget, failure of the Contractor upon request to account for the use or disposition of funds, actual or apparent failure of the Contractor to meet the standard of performance, accounting, billing and/or invoicing irregularities, out of scope work, delays in the Project Schedule, misrepresentations or any other factor that the Energy Commission considers in its discretion might negatively impact the public benefit to be gained from the project and/or the prudent expenditure of public funds.

- a. Compliance. Upon receipt of such stop work order, the Contractor shall immediately (1) cease incurring any project expenses for which it will seek reimbursement; (2) refrain from invoicing the Energy Commission for expenses

incurred after the date of receipt of the stop work order; (3) take all other necessary steps to comply with the stop work order; and (4) use its best efforts to eliminate or minimize the incurrence of any and all further reimbursable costs allocable to the work stopped. Unless and until the Commission Agreement Officer lifts the stop work order in writing, the Contractor may not utilize Agreement funds for the payment of any work performed or expenses incurred after the date of receipt of the stop work order. The Contractor may use its own funds to continue the work under the Agreement, or if the Contractor has other legal sources of funding, it may continue the work using such alternative funds, in which case the Contractor shall maintain complete and accurate documentation of the source of payment for all such work performed and/or expenses incurred after the date of the stop work order.

- b. Equitable Adjustment. If factually and legally justified, an equitable adjustment may be made by the Energy Commission in its discretion upon written request by the Contractor. The Contractor shall have the burden of proving its legal entitlement to, and the amount of, any requested equitable adjustment in its favor. An equitable adjustment in favor of the Contractor shall not be made if the stop work order is the primary result of the Contractor's breach of the Agreement or other fault on the part of Contractor. Such adjustment request must be made by the Contractor no later than thirty (30) days after the date of the stop work order. The Contractor shall not receive an equitable adjustment in its favor if the Contractor breached the Agreement or otherwise is at fault or was the cause of the requested equitable adjustment.
- c. Canceling a Stop Work Order. The Contractor may resume work and normal contract invoicing only upon receipt of written instructions from the Commission Agreement Officer lifting the stop work order.

19. Termination of the Contract

a. Purpose

Because the Energy Commission is a state entity and provides funding on behalf of all California ratepayers, it must be able to terminate the Agreement upon the default of the Contractor and to proceed with the work required under the Agreement in any manner it deems proper. The Contractor agrees that upon any of the events triggering the termination of the Agreement by the Energy Commission, the Energy Commission has the right to terminate the Agreement, and it would constitute bad faith of the Contractor to interfere with the immediate termination of the Agreement by the Energy Commission.

b. Breach

The Energy Commission will provide the Contractor written notice of intent to terminate due to the Contractor's breach. The Contractor will have fifteen (15) calendar days to fully perform or cure the breach. If the Contractor does not cure the breach within fifteen (15) days, the Energy Commission may, without prejudice to any of its other remedies, terminate this Agreement upon five (5) calendar days written notice to the Contractor. In this event, the Energy Commission will pay the Contractor only the reasonable value of the services performed satisfactorily by the Contractor before the notice of termination, as may be agreed upon by the parties or determined by a court of law, but not to exceed the maximum payable Agreement amount.

c. For Cause

The Energy Commission may, for cause, terminate this Agreement upon giving thirty (30) calendar days advance written notice to the Contractor. In this event, the Contractor will use all reasonable efforts to mitigate its expenses and obligations. The Energy Commission will pay the Contractor for any services rendered and expenses incurred within thirty (30) days after notice of termination that the Contractor could not have avoided by reasonable efforts, in an amount not to exceed the maximum payable Agreement amount. The Contractor shall relinquish possession of equipment purchased for this Agreement with Energy Commission funds to the Commission.

The term “for cause” includes but is not limited to the following:

- Partial or complete loss of match funds;
- Reorganization to a business entity unsatisfactory to the Energy Commission;
- Retention or hiring of Subcontractors, or replacement or addition of personnel, that fail to perform to the standards and requirements of this Agreement;
- The Contractor’s inability to pay its debts as they become due and/or the Contractor’s default of an obligation that impacts its ability to perform under this Agreement; or
- Significant change in state or Energy Commission policy such that the work or product being funded would not be supported by the Commission.

d. Without Cause

The Energy Commission may terminate this Agreement without cause in whole or in part, upon giving thirty (30) days advance written notice to the Contractor. In this event, the Contractor will use all reasonable efforts to mitigate its expenses and obligations. Also, the Energy Commission will pay the Contractor for all satisfactory services rendered and expenses incurred within thirty (30) calendar days after notice of termination that the Contractor could not avoid by reasonable efforts, in an amount not to exceed the maximum payable under this Agreement.

20. Termination of Grants

The Commission retains the right to terminate Grants under this Agreement. The Contractor shall terminate a Grant only with prior written approval by the Commission Agreement Manager. The Contractor may request the Commission’s approval to terminate a Grant by submitting a written request to the Commission Agreement Manager that describes why the Grant should be terminated. If the Commission decides to terminate the Grant, the Contractor shall terminate the Grant according to Section 19 (Termination of the Contract), but as applied between the Contractor and Grantee.

21. Indemnification

To the extent allowed under California law, the Contractor shall indemnify, defend, and hold harmless the state (including the Energy Commission) and state officers, agents, and employees from any and all claims and losses in connection with this Agreement.

22. Confidentiality

a. Identification of Confidential Information

Prior to the effective date of this Agreement, the Contractor will identify all deliverables (or information contained within deliverables) that it considers to be confidential, in addition to the legal basis for confidentiality, in Attachment 1 to this Exhibit. If the Energy Commission agrees that the information is confidential, it will not disclose it except as provided in subsection (b).

- 1) During the Agreement, if the Contractor develops additional deliverables (or information contained within deliverables) not originally anticipated as confidential, it shall follow the procedures for a request for designation of confidential information specified in Title 20 California Code of Regulations (CCR) Section 2505.

The Energy Commission's Executive Director will make the confidentiality determination. Following this determination, the confidential information must be added to Attachment 1 through an amendment (see the "Amendments" section). The Energy Commission will not disclose information subject to an application for confidential designation except as provided in subsection (b).

- 2) When submitting deliverables containing confidential information, the Contractor shall mark each page of any document containing confidential information as "confidential", and present it in a sealed package to the Contracts, Grants, and Loans Office.

The Commission Agreement Manager may require the Contractor to submit a non-confidential version of the deliverable, if it is feasible to separate the confidential information from the non-confidential information. The Contractor is not required to submit such deliverables in a sealed package.

b. Disclosure of Confidential Information

The Energy Commission will only disclose confidential information under the circumstances specified in Title 20 CCR sections 2506, 2507, and 2508. All confidential information that is legally disclosed by the Contractor or any other entity will become a public record and will no longer be subject to the Energy Commission's confidentiality designation.

The Contractor, and its Subcontractors, Vendors, and any lower tiered level of Sub-Subcontractors and Vendors, (through terms in subcontract agreements) shall identify solicitations developed by the Contractor and Subcontractors, Vendors, and any lower tiered level of Sub-Subcontractors and Vendors, as confidential under California Government Code section 6255 and will keep them confidential until the solicitation is released to the public or a court of competent jurisdiction order the documents made public. In addition, the Contractor, and its Subcontractors, Vendors, and any lower tiered level of Sub-Subcontractors and Vendors, (through terms in subcontract agreements) shall identify applications received for the solicitations as confidential under California Government Code section 6255 and will keep them confidential until the Notice of Proposed Awards (NOPA) is issued by the Energy Commission. After the NOPA is posted, applications will be publicly available unless an application for confidentiality is made to and approved by the Energy Commission pursuant to Title 20 CCR

section 2505.

c. Waiver of Consequential Damages

In no event will the Energy Commission, the California Public Utilities Commission, or the state of California be liable for any special, incidental, or consequential damages based on breach of warranty, breach of contract, negligence, strict tort, or any other legal theory for the disclosure of the Contractor's confidential information, even if the Commission has been advised of the possibility of such damages.

Damages that the Energy Commission, the California Public Utilities Commission, and the state of California will not be responsible for include but are not limited to: lost profit; lost savings or revenue; lost goodwill; lost use of the deliverable or any associated equipment; cost of capital; cost of any substitute equipment, facilities, or services; downtime; the claims of third parties including customers; and injury to property.

d. Limitations on the Contractor's Disclosure of Deliverables

- 1) During the Agreement, the Contractor must receive approval from the Commission Agreement Manager prior to disclosing the contents of any draft deliverable to a third party. However, if the Energy Commission makes a public statement about the content of any deliverable provided by the Contractor and the Contractor believes the statement is incorrect, the Contractor may state publicly what it believes is correct.
- 2) After any document submitted has become a part of the public records of the state, the Contractor may publish or use it at its own expense.
- 3) Except as provided in Title 20 CCR sections 2506, 2507, and 2508, the Contractor may not disclose any information provided to it by the Energy Commission for the performance of this Agreement if the information has been designated as confidential or is the subject of a pending application for confidential designation. At the election of the Commission Agreement Manager, the Contractor, its employees, and its Subcontractors, Vendors, all levels of lower-tiered Sub-Subcontractors and Vendors, and Grantees must execute a confidentiality agreement provided by the Commission Agreement Manager.
- 4) The Contractor will ensure that each of its officers, employees, and Subcontractors, Vendors, all levels of lower-tiered Sub-Subcontractors and Vendors, and Grantees who are involved in the performance of this Agreement are informed about these disclosure limitations and will abide by them.

23. *Pre-Existing and Independently Funded Intellectual Property*

a. Ownership

The Energy Commission makes no ownership, license, or royalty claims to pre-existing intellectual property, independently funded intellectual property, or project-relevant pre-existing or independently funded intellectual property. **"Ownership"** means exclusive possession and control of all rights to property, including the right to use and transfer property. Intellectual property licenses and royalties are discussed in Section 24 (Intellectual Property) and Section 25

(Royalty Payments to the Commission).

- 1) **“Pre-existing intellectual property”** means: (a) inventions, technologies, designs, drawings, data, software, formulas, compositions, processes, techniques, works of authorship, trademarks, service marks, and logos that the Contractor or a third party owned or possessed prior to the effective date of this Agreement and that have not been developed, altered, or reduced to practice with Energy Commission or match funds; and (b) associated proprietary rights to these items that are obtained without Energy Commission or match funds, such as patent and copyright.
- 2) **“Independently funded intellectual property”** means: (a) inventions, technologies, designs, drawings, data, software, formulas, compositions, processes, techniques, works of authorship, trademarks, service marks, and logos that are created, conceived, discovered, made, developed, altered, or reduced to practice by the Contractor or a third party during or after the Agreement term without Energy Commission or match funds; and (b) associated proprietary rights to these items that are obtained without Energy Commission or match funds, such as patent and copyright.

“Works of authorship” does not include written deliverables and products created for this Agreement, any Subaward with a Subcontractor or Vendor, with any lower tier of Sub-Subcontractors and Vendors, or Grant reporting and management purposes, such as reports, summaries, lists, letters, agendas, schedules, and invoices. The Commission owns such deliverables and products regardless of their funding source.

- 3) **“Project-relevant pre-existing intellectual property”** and **“project-relevant independently funded intellectual property”** mean pre-existing and independently funded intellectual property used to support a premise, postulate, or conclusion referred to or expressed in any deliverable or product under this Agreement.

b. Project-Relevant Pre-Existing and Independently Funded Intellectual Property

- 1) Identification of Property

The Contractor shall identify all project-relevant pre-existing intellectual property in Attachment 1 to this Exhibit prior to the effective date of the Agreement, or within sixty (60) days of becoming aware that the property has been or will be used to support a premise, postulate, or conclusion referred to or expressed in any deliverable under this Agreement. Attachment 1 must be amended by an amendment (see the “Amendments” section).

For each Subaward with a Subcontractor, Vendor, or any lower tier of Sub-Subcontractors and Vendors and for each Grant, the Contractor shall identify all project-relevant pre-existing intellectual property in Attachment 1 to this Exhibit prior to the effective date of the Subaward or Grant or within sixty (60) days of becoming aware that the property has been or will be used to support a premise, postulate, or conclusion referred to or expressed in any product under the Subaward or Grant.

The Contractor will identify all project-relevant independently funded intellectual property and the source of funding for the property in Attachment 1 to this Exhibit within sixty (60) days of becoming aware that the property has been or will be used to support a premise, postulate, or conclusion referred to or expressed in any deliverable under this Agreement.

For each Subaward with a Subcontractor, Vendor, or any lower tier of Sub-Subcontractor and Vendor, and for each Grant, the Contractor will identify all project-relevant independently funded intellectual property and the source of funding for the property in Attachment 1 to this Exhibit prior to the effective date of the Subaward and Grant or within sixty (60) days of becoming aware that the property has been or will be used to support a premise, postulate, or conclusion referred to or expressed in any product under the Subaward or Grant.

a) Failure to identify project-relevant pre-existing or independently funded intellectual property in Attachment 1 to this Exhibit may result in the property's designation as "intellectual property" that is subject to licenses and royalties, as described in Section 24 (Intellectual Property) and Section 25 (Royalty Payments to the Commission).

2) Access to Property

The extent of Energy Commission access to project-relevant pre-existing and independently funded intellectual property is limited to that reasonably necessary to: (a) demonstrate the validity of any premise, postulate, or conclusion referred to or expressed in any deliverable or product; or (b) establish a baseline for repayment purposes.

The California Public Utilities Commission has the same access rights as the Energy Commission to project-relevant pre-existing and independently funded intellectual property that is used to support a premise, postulate, or conclusion referred to or expressed in any deliverable or product funded in whole or in part by EPIC under this Agreement.

Upon the Commission Agreement Manager's request, the Contractor shall provide the Commission Agreement Manager and any reviewers designated by the Energy Commission (or the California Public Utilities Commission, if applicable) with access to review the Contractor's, Subcontractors', Vendors', or any lower tier of Sub-Subcontractors' and Vendors', and Grantee's project-relevant pre-existing and independently funded intellectual property. If the property has been designated as confidential as specified in Section 22 (Confidentiality), the Energy Commission will only disclose it under the circumstances specified in Title 20 CCR sections 2506, 2507, and 2508.

3) Preservation of Property

The Contractor shall preserve any project-relevant pre-existing or independently funded intellectual property, including project-relevant pre-

existing or independently funded intellectual property of Subcontractors, Vendors, or any lower tier of Sub-Subcontractors and Vendors, as well as Grantees, at its own expense for at least ten (10) years from the Agreement's end date, unless the Contractor agrees to a longer retention period.

The Energy Commission will have reasonable access to the project-relevant pre-existing or independently funded property throughout the retention period. The California Public Utilities Commission has the same access rights as the Energy Commission to property used to support a premise, postulate, or conclusion referred to or expressed in any deliverable funded in whole or in part by EPIC under this Agreement.

24. **Intellectual Property**

a. Ownership

“Contractor Intellectual Property” means: (a) inventions, technologies, designs, drawings, data, software, formulas, compositions, processes, techniques, works of authorship, trademarks, service marks, and logos that are created, conceived, discovered, made, developed, altered, or reduced to practice by the Contractors, its Subcontractors, Vendors, and all levels of lower-tiered Sub-Subcontractors and Vendors, with Agreement or match funds during or after the Agreement term; (b) any associated proprietary rights to these items, such as patent and copyright; and (c) any upgrades or revisions to these items.

- 1) The Energy Commission owns all Contractor Intellectual Property, unless the Commission authorizes the Contractor's ownership of intellectual property. All intellectual property owned by the Contractor will be identified in Attachment 1 to this Exhibit and will be designated as **“Contractor-Owned Intellectual Property”** and is subject to the license described below. Failure to identify Contractor-Owned Intellectual Property in Attachment 1 may result in the Commission's ownership of the Contractor Intellectual Property.
- 2) The Energy Commission owns all deliverables identified in the Scope of Work.

“Grantee Intellectual Property” means: (a) inventions, technologies, designs, drawings, data, software, formulas, compositions, processes, techniques, works of authorship, trademarks, service marks, and logos that are created, conceived, discovered, made, developed, altered, or reduced to practice by the Grantee with Agreement or match funds during or after the Grant term; (b) any associated proprietary rights to these items, such as patent and copyright; and (c) any upgrades or revisions to these items.

- 1) As between the Energy Commission, Contractor, and Grantees, the Grantee owns all Grantee Intellectual Property, subject to the licenses described in subsection c. The Contractor shall require Grantees to be subject to the licenses described in subsection c below.
- 2) The Energy Commission owns, and the Contractor shall ensure that each Grant contains terms indicating that the Energy Commission owns, all products identified in the Grant, with the exception of products that fall within the definition of “Grantee Intellectual Property.”

b. Intellectual Property Licenses for Contractor-Owned Intellectual Property

- 1) If the Contractor-Owned Intellectual Property is funded in whole or in part by EPIC, both the Energy Commission and the California Public Utilities Commission have a no-cost, non-exclusive, transferable, irrevocable, royalty-free, worldwide, perpetual license to use, publish, translate, modify, and reproduce the Contractor-Owned Intellectual Property for governmental purposes.

If the contractor-owned intellectual property is funded exclusively by ERPA, only the Energy Commission has the license described above. Energy Commission and California Public Utilities Commission licenses are transferable only to load-serving entities for the purpose described below.

- 2) If the Contractor-Owned Intellectual Property is funded in whole or in part by EPIC, both the Energy Commission and the California Public Utilities Commission may grant load-serving entities a no-cost, non-exclusive, transferable, irrevocable, royalty-free, worldwide, perpetual license to use, publish, translate, modify, and reproduce the Contractor-Owned Intellectual Property to enhance the entities' service to EPIC ratepayers. "Load-serving entity" means a company or other organization that provides electricity to EPIC ratepayers.

The licenses are transferable to third parties only for the purpose of facilitating the load-serving entity's enhancement of service to EPIC ratepayers. Load-serving entities must obtain prior written approval from the Energy Commission or California Public Utilities Commission (whichever agency granted the load-serving entity the license) in order to transfer the license to a third party.

- 3) The Energy Commission may grant the Contractor a license to use, publish, translate, modify, and/or reproduce Contractor Intellectual Property. Such intellectual property will be identified in Attachment 1 to this Exhibit and will be designated as "**Contractor-Licensed Intellectual Property.**"

- 4) If any intellectual property that is subject to the licenses above has been designated as confidential as specified in Section 22, all license holders will only disclose the Contractor Intellectual Property under the circumstances specified in Title 20 CCR sections 2506, 2507, and 2508.

All license holders will ensure that their officers, employees, and anyone else who has access to the intellectual property are informed of and abide by the disclosure limitations in Section 22 (Confidentiality).

- 5) The Contractor shall include its agreements with Subcontractors, Vendors, and all levels of lower-tiered Sub-Subcontractors and Vendors, terms to ensure all such rights exist.

c. Intellectual Property Licenses for Grantee's Intellectual Property

The Contractor agrees to the following rights and shall include terms in each Grant to ensure all such rights exist.

- 3) Both the Energy Commission and the California Public Utilities Commission have a no-cost, non-exclusive, transferable, irrevocable, royalty-free, worldwide, perpetual license to use, publish, translate, modify, and reproduce Grantee's Intellectual Property for governmental purposes. The licenses are transferable only to load-serving entities for the purpose described below.

Under limited circumstances, both the Energy Commission and the California Public Utilities Commission may grant load-serving entities a no-cost, non-exclusive, transferable, irrevocable, royalty-free, worldwide, perpetual license to use, publish, translate, modify, and reproduce Grantee's Intellectual Property to enhance the entities' service to EPIC ratepayers. The intellectual property that may be licensed to load-serving entities is limited to models and analytical tools that can be used to inform distribution planning and decision-making that benefits electric ratepayers. No intellectual property licenses for any other type of developed technology will be granted to load-serving entities by the Energy Commission or the California Public Utilities Commission under this Agreement.

"Load-serving entity" means a company or other organization that provides electricity to EPIC ratepayers.

The licenses are transferable to third parties only for the purpose of facilitating the load-serving entity's enhancement of service to EPIC ratepayers. Load-serving entities must obtain prior written approval from the Energy Commission or California Public Utilities Commission (whichever agency granted the load-serving entity the license) in order to transfer the license to a third party.

- 4) The Grantee has a non-exclusive, non-transferable, irrevocable, worldwide, perpetual license to use, publish, translate, modify, and reproduce written products under the grant that the Commission owns because they do not fall under the definition of Grantee Intellectual Property.
- 5) If any Grantee Intellectual Property that is subject to the licenses above has been designated as confidential as specified in Section 23 (Confidentiality), all license holders will only disclose the intellectual property under the circumstances specified in Title 20 CCR sections 2506, 2507, and 2508.

All license holders will ensure that their officers, employees, and Subcontractors who have access to the Grantee Intellectual Property are informed of and abide by the disclosure limitations in Section 22 (Confidentiality).

d. Energy Commission's Rights to Inventions

The Contractor agrees to the following rights and shall include terms in its subcontracts and Grants to ensure such rights exist.

“Invention” means Contractor-Owned Intellectual Property or Grantee Intellectual Property that is patentable.

1) March-In Rights

At the Energy Commission’s request, the Contractor, Subcontractors, Vendors, all lower-tiered levels of Sub-Subcontractors and Vendors, or Grantees will forfeit and assign to the Energy Commission all rights to any invention (with the exception of U.S. Department of Energy reserved rights) if the Contractor, Subcontractor, Vendor, all lower-tiered levels of Sub-Subcontractors and Vendors, Grantee, or assignee of any of these entities, has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of the invention. The Energy Commission will have the unfettered right to use and/or dispose of the rights in whatever manner it deems most suitable to help transfer the invention into the marketplace, including but not limited to seeking patent protection or licensing the invention.

2) Notice of Patent

If any patent is issued for an invention by the Contractor, a Subcontractor, Vendor, all lower-tiered levels of Sub-Subcontractors and Vendors, or a Grantee, the Contractor shall send the Commission Agreement Manager written notice of the issuance within three (3) months of the issuance date. The notice shall include the patent title, issuance number, and a general description of the invention.

3) Legal Notice

The Contractor, Subcontractor, Vendor, all lower-tiered levels of Sub-Subcontractors and Vendors, Grantee, and all persons and/or entities obtaining an ownership interest in patentable Contractor-Owned Intellectual Property or Grantee Intellectual Property shall include the following statement within the specification of any United States patent application, and any subsequently issued patent for the invention:

“This invention was made with State of California support under California Energy Commission agreement number 300-15-007. The Energy Commission has certain rights to this invention.”

e. Access to and Preservation of Contractor-Owned Intellectual Property

1) Access to Intellectual Property

Upon the Commission Agreement Manager’s request, the Contractor shall provide the Commission Agreement Manager and any individuals designated by the Energy Commission with access to Contractor-Owned Intellectual Property and Grantee Intellectual Property in order to exercise the license and march-in rights described above, and to determine any royalty payments due under the Agreement.

If the Contractor-Owned Intellectual Property or Grantee Intellectual Property is funded in whole or in part by EPIC, the Contractor shall provide the California Public Utilities Commission with the same access rights as the Energy Commission.

2) Preservation of Intellectual Property

The Contractor, Subcontractors, Vendors, all lower-tiered levels of Sub-Subcontractors and Vendors, shall preserve Contractor Intellectual Property and Contractor shall ensure that Grantees preserve Grantee Intellectual Property at their respective expenses for at least ten (10) years from the Agreement's end date, unless the Contractor agrees to a longer retention period.

f. Intellectual Property Indemnity

The Contractor may not, in supplying work under this Agreement, knowingly infringe or misappropriate any intellectual property right of a third party, and shall take reasonable actions to avoid infringement.

The Contractor, Subcontractors, Vendors, all lower-tiered levels of Sub-Subcontractors and Vendors, and Grantees, through terms the Contractor shall include in its subcontracts and Grants, shall defend and indemnify the Energy Commission and the California Public Utilities Commission from and against any claim, lawsuit, or other proceeding, loss, cost, liability, or expense (including court costs and reasonable fees of attorneys and other professionals) arising out of: (i) any third party claim that a deliverable infringes any patent, copyright, trade secret, or other intellectual property right of any third party; or (ii) any third party claim arising out of the negligent or other tortious acts or omissions by the Contractor or its employees, Subcontractors, Vendors, all lower-tiered levels of Sub-Subcontractors and Vendors, and Grantees, or employees or agents of any of them in connection with or related to the deliverables or the Contractor's performance under this Agreement.

g. The Contractor shall include the applicable intellectual property provisions above in its agreements with all Subcontractors, Vendors, all lower-tiered levels of Sub-Subcontractors and Vendors, and Grantees.

25. Royalty Payments to the Commission

"Sale," "sales," and **"sold"** mean the sale, license, lease, or other transfer of Contractor Intellectual Property, Contractor-Owned Intellectual Property, or Grantee Intellectual Property. **"Sales Price"** means the price at which the Contractor Intellectual Property, Contractor-Owned Intellectual Property, or Grantee Intellectual Property is sold, excluding sales tax.

a. The Contractor Subcontractors, Vendors, all lower-tiered levels of Sub-Subcontractors and Vendors, and Grantees shall pay the Energy Commission a royalty of one and one-half percent (1.5%) of the sales price of all sales for which the Contractor, Subcontractors, Vendors, all lower-tiered levels of Sub-Subcontractors and Vendors, and Grantee respectively receives a payment, beginning on the Agreement's effective date and extending for ten (10) years from the Agreement's end date.

b. The Contractor, Subcontractors, Vendors, all lower-tiered levels of Sub-Subcontractors and Vendors, and Grantees shall make payments in annual installments due on the first day of March in the calendar year immediately following the year during which the Contractor, Subcontractors, Vendors, all lower-tiered levels of Sub-Subcontractors and Vendors, or Grantee respectively received any payment for sales.

- c. The Contractor, Subcontractors, Vendors, all lower-tiered levels of Sub-Subcontractors and Vendors, and Grantees are not required to make a royalty payment for any calendar year in which payments for their respective sales are less than \$1,000. Total royalty payments from the Contractor, Subcontractors, Vendors, all lower-tiered levels of Sub-Subcontractors and Vendors, will be limited to a total of three (3) times the amount of Commission funds respectively received by the Contractor (not including the amount in Grants). Royalty payments from each Grantee will be limited to a total of three (3) times the amount of Commission funds received by the Grantee via the Contractor.
- d. If intellectual property was developed in part with match funds during the Agreement term, the royalty payment will be reduced in accordance with the percentage of intellectual property development activities that were funded with match funds. For example, if 10% of the development activities were funded with match funds during the Agreement and payments for sales totaled \$100,000 in one year, the Contractor would owe the Energy Commission \$1,350 for the year (1.5% of \$100,000 = \$1,500; 10% of \$1,500 = \$150; \$1,500 - \$150 = \$1,350).
- e. The Contractor, Subcontractors, Vendors, all lower-tiered levels of Sub-Subcontractors and Vendors, and Grantees may make an early buyout payment to the Energy Commission without a pre-payment penalty, as an alternative to making annual royalty payments for ten (10) years following the Agreement's end date. The payment must be in a lump sum amount equal to one and a half (1.5) times the amount of Commission funds respectively received by the Contractor (not including the amount in Grants) and by each Grantee under the Agreement and made within five (5) years of the Agreement's end date. The payment amount due under the early buyout option will not be reduced by the percentage of match funds as described above.
- f. The Contractor, Subcontractors, Vendors, all lower-tiered levels of Sub-Subcontractors and Vendors, and Grantees shall not make any sale of intellectual property for consideration other than fair market value. Such activity constitutes breach, and will obligate the Contractor, Subcontractors, Vendors, all lower-tiered levels of Sub-Subcontractors and Vendors, or Grantee to repay within sixty (60) days the early buyout amount due without limiting any of the Energy Commission's other available rights, remedies, or actions.
- g. Royalty payments not made within fifteen (15) days of the due date will constitute breach. The payments will become debt obligations of the Contractor, Subcontractors, Vendors, all lower-tiered levels of Sub-Subcontractors and Vendors, or Grantee to the Energy Commission, due upon demand and bearing interest at the maximum interest rate allowed by law without limiting any of the Energy Commission's other available rights, remedies, or actions.
- h. The Contractor, Subcontractors, Vendors, all lower-tiered levels of Sub-Subcontractors and Vendors, and Grantees shall maintain separate accounts within their respective financial and other records for the purpose of tracking components of sales and royalties due to the Energy Commission under this Agreement.
- i. Payments to the Energy Commission are subject to audit as provided for under the Recordkeeping, Cost Accounting, and Auditing section.
- j. The Contractor will include these royalty provisions in its agreements with all

Subcontractors, Vendors, all lower-tiered levels of Sub-Subcontractors and Vendors, who develop or assist with the development of Contractor Intellectual Property, and Grantees who develop Grantee Intellectual Property.

- k. Each Subaward to Subcontractors, Vendors, all lower-tiered levels of Sub-Subcontractors and Vendors, and each Grant the Contractor enters into must expressly name the Energy Commission as a third-party beneficiary of payments the Grantee receives for the Grantee Intellectual Property or the Subcontractors, Vendors, all lower-tiered levels of Sub-Subcontractors and Vendors receive for Contractor Intellectual Property. The Contractor is not entitled to receive any royalty payments from the Subcontractors, Vendors, all lower-tiered levels of Sub-Subcontractors and Vendors, and Grantees. The Contractor must require the Subcontractors, Vendors, all lower-tiered levels of Sub-Subcontractors and Vendors, and Grantee to make royalty payments directly to the Energy Commission. The Commission Agreement Manager will provide the Contractor guidance regarding the process required for the Grantee to submit royalty payments directly to the Commission.

26. General Provisions

a. Governing Law

This Agreement is governed by the laws of the State of California as to interpretation and performance.

b. Independent Capacity

In the performance of this Agreement, the Contractor, Subcontractors, Vendors, all lower-tiered levels of Sub-Subcontractors and Vendors, and Grantees, and the agents and employees of all of them will act in an independent capacity and not as officers, employees, or agents of the State of California.

c. Assignment

This Agreement is not assignable or transferable by the Contractor either in whole or in part without the consent of the Energy Commission in the form of an amendment.

d. Timeliness

Time is of the essence in this Agreement.

e. Severability

If any provision of this Agreement is unenforceable or held to be unenforceable, all other provisions of this Agreement will remain in full force and effect.

f. Waiver

No waiver of any breach of this Agreement constitutes waiver of any other breach. All remedies in this Agreement will be taken and construed as cumulative, meaning in addition to every other remedy provided in the Agreement or by law.

g. Assurances

The Commission reserves the right to seek further written assurances from the Contractor and its team that the work under this Agreement will be performed in accordance with the terms of the Agreement.

h. Change in Business

- 1) The Contractor will promptly notify the Energy Commission of the occurrence of any of the following for itself and each Subcontractor, any lower-tiered level of Sub-Subcontractor, and Grantee:
 - a) A change of address.
 - b) A change in business name or ownership.
 - c) The existence of any litigation or other legal proceeding affecting the Agreement or any Grant.
 - d) The occurrence of any casualty or other loss to project personnel, equipment, or third parties.
 - e) Receipt of notice of any claim or potential claim against the Contractor or Grantee for patent, copyright, trademark, service mark, and/or trade secret infringement that could affect the Energy Commission's rights.
- 2) The Contractor shall provide the Commission Agreement Manager with written notice of a planned change or reorganization of the type of business entity under which it does business. A change of business entity or name change requires an amendment assigning or novating the Agreement to the changed entity. If the Energy Commission does not seek to amend this Agreement or enter into a new agreement with the changed or new entity for any reason (including that the Commission is not satisfied that the new entity can perform in the same manner as the Contractor), it may terminate this Agreement as provided in Section 19 (Termination of the Contract).

i. Access to Sites and Records

Energy Commission staff and representatives shall have reasonable access to all project sites and records related to this Agreement. California Public Utilities Commission staff and representatives shall have reasonable access to all project sites and records related to the EPIC-funded work completed under this Agreement.

j. Prior Dealings, Custom, or Trade Usage

These terms and conditions may not be modified or supplemented by prior dealings, custom, or trade usage.

k. Survival of Terms

Certain provisions shall survive the completion or termination date of this Agreement for any reason. The provisions include but are not limited to:

- Legal Statements on Deliverables (included in Section 6, "Deliverables")
- Payment of Funds (Section 9)
- Recordkeeping, Cost Accounting, and Auditing (Section 13)
- Equipment (Section 15)
- Conflicts of Interest (Section 16)

- Disputes (Section 17)
- Termination of the Contract (Section 19)
- Termination of Grants (Section 20)
- Indemnification (Section 21)
- Pre-Existing and Independently Funded Intellectual Property (Section 23)
- Intellectual Property (Section 24)
- Royalty Payments to the Commission (Section 25)
- Change in Business (see this section)
- Access to Sites and Records (see this section)

27. Certifications and Compliance

a. Federal, State, and Local Laws

The Contractor shall comply with all applicable federal, state and local laws, rules and regulations.

b. General Terms and Conditions

The Contractor shall comply with all state general terms and conditions incorporated by reference in Exhibit C, including the Contractor Certification Clauses (CCC 307).

28. Definitions

- **Agreement Term** means the length of this Agreement, as specified on the Agreement signature page (form STD 213 or STD 213A if amended).
- **Budget Reallocation** means the movement of funds between tasks identified in the budget (Exhibit B).
- **Confidential Information** means information that the Contractor has satisfactorily identified as confidential in Attachment 1 to this Exhibit and that the Energy Commission has agreed to designate as confidential under Title 20 California Code of Regulations section 2505.
- **Contractor Intellectual Property** means: (a) inventions, technologies, designs, drawings, data, software, formulas, compositions, processes, techniques, works of authorship, trademarks, service marks, and logos that are created, conceived, discovered, made, developed, altered, or reduced to practice by the Contractor Subcontractors, Vendors, all lower-tiered levels of Sub-Subcontractors and Vendors, or its with Agreement or match funds during or after the Agreement term; (b) any associated proprietary rights to these items, such as patent and copyright; and (c) any upgrades or revisions to these items.
- **Contractor-Licensed Intellectual Property** means Contractor Intellectual Property licensed from the Energy Commission to the Contractor. Contractor-Licensed Intellectual Property must be identified in Attachment 1 to this Exhibit.
- **Contractor-Owned Intellectual Property** means Contractor Intellectual Property that is owned by the Contractor, with the Energy Commission's permission. Contractor-Owned Intellectual Property must be identified in Attachment 1 to this Exhibit.

- **Data** means any recorded information that relates to the project funded by the Agreement, whether created or collected before or after the Agreement's effective date.
- **Deliverable** means any tangible item specified for delivery to the Energy Commission by the Contractor in the Scope of Work.
- **Disabled Veteran Business Enterprise (DVBE)** means a business that is certified by the California Department of General Services as meeting the requirements of California Military and Veterans Code Section 999(b)(7).
- **Effective Date** means the date on which this Agreement has been signed by the last party required to sign, provided that the Agreement has been approved by the Energy Commission at a business meeting (or by the Executive Director or his/her designee), and by the California Department of General Services.
- **EPIC** means the Electric Program Investment Charge, an electricity ratepayer-funded surcharge authorized by the California Public Utilities Commission in December 2011.
- **Equipment** means products, objects, machinery, apparatus, implements, or tools that are purchased or constructed with Energy Commission funds for the project, and that have a useful life of at least one year and an acquisition unit cost of at least \$5,000. "Equipment" includes products, objects, machinery, apparatus, implements, or tools that are composed by over thirty percent (30%) of materials purchased for the project. For purposes of determining depreciated value of equipment used in the Agreement, the project will terminate at the end of the normal useful life of the equipment purchased and/or developed with Energy Commission funds. The Energy Commission may determine the normal useful life of the equipment.
- **Grant** means an agreement between the Contractor and a Grantee.
- **Grantee** means the recipient of Series A or Series B grant funding from the SEED Initiative.
- **Grantee Intellectual Property** means: (a) inventions, technologies, designs, drawings, data, software, formulas, compositions, processes, techniques, works of authorship, trademarks, service marks, and logos that are created, conceived, discovered, made, developed, altered, or reduced to practice by the Grantee or its Subcontractors with Agreement or match funds during or after the Grant term; (b) any associated proprietary rights to these items, such as patent and copyright; and (c) any upgrades or revisions to these items.
- **Incurred Costs:** An expense for which an individual or entity has become liable (legally obligated) to pay.
- **Independently Funded Intellectual Property** means: (a) inventions, technologies, designs, drawings, data, software, formulas, compositions, processes, techniques, works of authorship, trademarks, service marks, and logos that are created, conceived, discovered, made, developed, altered, or reduced to practice by the Contractor or a third party during or after the Agreement term without Energy Commission or match funds; and (b) associated proprietary rights to these items that are obtained without Energy Commission or match funds, such as patent and copyright.

“Works of authorship” does not include written deliverables and products created for Agreement or Grant reporting and management purposes, such as reports, summaries, lists, letters, agendas, schedules, and invoices. The Commission owns such deliverables and products regardless of their funding source.

- **Invention** means Contractor-Owned Intellectual Property or Grantee Intellectual Property that is patentable.
- **Load-serving entity** means a company or other organization that provides electricity to EPIC ratepayers.
- **Match Funds** means cash or in-kind (i.e., non-cash) contributions provided by the Contractor or a third party for a project funded by the Energy Commission. If this Agreement resulted from a solicitation, refer to the solicitation’s discussion of match funding for guidelines specific to the project.
- **Materials** means the substances used to construct a finished object, commodity, device, article, or product, such as equipment.
- **Ownership** means exclusive possession of all rights to property, including the right to use and transfer property.
- **Pre-existing Intellectual Property** means: (a) inventions, technologies, designs, drawings, data, software, formulas, compositions, processes, techniques, works of authorship, trademarks, service marks, and logos that the Contractor or a third party owned or possessed prior to the effective date of this Agreement and that have not been developed, altered, or reduced to practice with Energy Commission or match funds; and (b) associated proprietary rights to these items that are obtained without Energy Commission or match funds, such as patent and copyright.
- **Product** means any tangible item specified for delivery to the Contractor by the Grantee in the Grant.
- **Project** means the entire effort undertaken and planned by the Contractor and consisting of the work funded by the Energy Commission. The project may coincide with or extend beyond the Agreement term.
- **Project-Relevant Pre-existing Intellectual Property and Project-Relevant Independently Funded Intellectual Property** mean pre-existing and independently funded intellectual property used to support a premise, postulate, or conclusion referred to or expressed in any deliverable under this Agreement.
- **Sale, Sales, and Sold** mean the sale, license, lease, or other transfer of intellectual property.
- **Sales Price** means the price at which Contractor Intellectual Property or Grantee Intellectual Property is sold, excluding normal returns and allowances such as sales tax.
- **State** means the state of California and all California state agencies within it, including but not limited to commissions, boards, offices, and departments.
- **Subaward** or subcontract means, for the Contractor, all agreements it has with Subcontractors, Vendors, all lower-tiered levels of Sub-Subcontractors and Vendors. For a Subcontractor, a Subaward or subcontract means all agreements it has with Sub-Subcontractors and Vendors. For any lower-tiered level of Sub-

Subcontractor, a Subaward or subcontract means all agreements it has with its own Sub-Subcontractors and Vendors.

- **Subcontract** has the same meaning as Subaward. In some places in this Exhibit, “Subcontract” has been replaced with “Subaward,” but to the extent the word “Subcontract” still appears in this Agreement, it now has the same meaning as Subaward.
- **Subcontractor** means a person or entity that receives Agreement funds directly from the Contractor and is entrusted by the Contractor to make decisions about how to conduct some of the Agreement’s activities. A Subcontractor’s role involves discretion over Agreement activities and is not merely just selling goods or services. Both parties tried to add “and all lower-tiered levels of Sub-Sub-Subcontractors” everywhere “Subcontractor” is used, in case any instances were missed, all uses of “Subcontractor” anywhere in this Agreement also includes “and all lower-tiered levels of Sub-Subcontractors.”
- **Sub-Subcontractor** has the same meaning as a Subcontractor except that it receives funds from a Subcontractor or any lower tier level of a Sub-Subcontractor.
- **Vendor is** a person or entity that sells goods or services to the Contractor, Subcontractor, or any lower-tiered level of Sub-Subcontractor, in exchange for some of the Agreement funds, and does not make decisions about how to perform the grant’s activities. The Vendor’s role is ministerial and does not involve discretion over grant activities. Although both parties tried to add “and all lower-tiered levels of Vendors” everywhere “Vendor” is used, in case any instances were missed, all uses of “Vendor” in the Agreement also includes “and all lower-tiered levels of Vendors.”

29. Executive Order N-6-22 Russian Sanctions

On March 4, 2022, Governor Gavin Newsom issued Executive Order N-6-22 (the EO) regarding Economic Sanctions against Russia and Russian entities and individuals. “Economic Sanctions” refers to sanctions imposed by the U.S. government in response to Russia’s actions in Ukraine, as well as any sanctions imposed under state law. The EO directs state agencies to terminate contracts with, and to refrain from entering any new contracts with, individuals or entities that are determined to be a target of Economic Sanctions. Accordingly, should the State determine Contractor is a target of Economic Sanctions or is conducting prohibited transactions with sanctioned individuals or entities, that shall be grounds for termination of this agreement. The State shall provide Contractor advance written notice of such termination, allowing Contractor at least 30 calendar days to provide a written response. Termination shall be at the sole discretion of the State.

ATTACHMENT 1 Confidential Deliverables, Project-Relevant Pre-Existing and Independently Funded Intellectual Property, Contractor-Owned and Licensed Intellectual Property, and Grantee Intellectual Property

1. Instructions

Identification of Confidential Information

- **Prior to the effective date of the Agreement**, the Contractor must identify in **Section 2** of this attachment any deliverables (or information contained within deliverables) that it considers to be confidential. If the Energy Commission agrees that the information is confidential, it will not disclose it except as provided in Section 22 (Confidentiality) of these terms and conditions.
- **During the Agreement**, if the Contractor develops additional information not originally anticipated as confidential, it must follow the procedures for a request for designation of confidential information specified in Title 20 California Code of Regulations (CCR) section 2505.

The Energy Commission's Executive Director will make the confidentiality determination. Following this determination, the confidential information must be added to this attachment through an amendment (see Section 7 (Amendments)). The Energy Commission will not disclose information subject to an application for confidential designation except as provided in Section 22 (Confidentiality).

- **When submitting deliverables containing confidential information**, the Contractor must mark each page of any document containing confidential information as "confidential" and present it in a sealed package to the Contracts, Grants, and Loans Office.

The Commission Agreement Manager may require the Contractor to submit a non-confidential version of the deliverable, if it is feasible to separate the confidential information from the non-confidential information.

Identification of Project-Relevant Independently Funded and Pre-Existing Intellectual Property

- The Contractor must identify all project-relevant pre-existing intellectual property, project-relevant independently funded intellectual property, in **Section 3** of this attachment prior to the effective date of the Agreement, or within sixty (60) days of becoming aware that the property has been or will be used to support a premise, postulate, or conclusion referred to or expressed in any deliverable under the Agreement. This attachment must be changed in writing (see Section 7 (Amendments)). Terms in this section have the same meaning as in Exhibit D or elsewhere in the Agreement.
- **Failure to identify project-relevant pre-existing or independently funded intellectual property** in this attachment may result in licenses and royalties, as described in Section 24 (Intellectual Property) and Section 25 (Royalty Payments to the Commission).

Identification of Contractor-Owned Intellectual Property

- All Contractor-Owned Intellectual Property must be identified in **Section 4** of this attachment, as specified in Section 24 (Intellectual Property).

- **“Contractor-Owned Intellectual Property”** means Contractor Intellectual Property owned by the Contractor, with the Energy Commission’s permission.
- **Failure to identify Contractor-Owned Intellectual Property** in this attachment may result in the Commission’s ownership of the intellectual property.

Identification of Contractor-Licensed Intellectual Property

- All Contractor-Licensed Intellectual Property must be identified in **Section 5** of this attachment, as specified in Section 24 (Intellectual Property).
 - **“Contractor-Licensed Intellectual Property”** means Contractor Intellectual Property licensed from the Energy Commission to the Contractor.
- **Failure to identify Contractor-Licensed Intellectual Property** in this attachment will result in the Contractor’s lack of a license to use, publish, translate, modify, and/or reproduce the intellectual property.

2. Confidential Deliverables and/or Confidential Information Contained within Deliverables

The Energy Commission designates the following deliverables (or information contained within deliverables) as confidential, in accordance with Title 20 California Code of Regulations section 2505(c)(2)(B).

Deliverable name	NONE
Task/subtask number	
Information to be kept confidential	<input type="checkbox"/> Entire deliverable
	<input type="checkbox"/> Selected information within deliverable (<i>describe below; be as specific as possible</i>):
Legal basis for confidentiality designation	<input type="checkbox"/> California Public Records Act, located in California Government Code Sections 6250 et seq. (<i>identify the relevant section(s) and subsections(s) below</i>):
	<input type="checkbox"/> Other law (<i>identify below, including the relevant section(s) and subsections(s)</i>):
Term of confidentiality	MM-DD-YY to MM-DD-YY
<p>Trade secrets only</p> <p>Answer the following questions if the deliverable/information described above is considered a trade secret (i.e., confidential business information that provides the business with a competitive advantage):</p> <ol style="list-style-type: none"> 1. What is the nature of the competitive advantage provided by the deliverable/information? 2. How would the competitive advantage be lost by disclosure? (generally describe the value of the deliverable/information and the ease or difficulty with which it may be legitimately acquired or duplicated by others). 	

3. Project-Relevant Pre-Existing Intellectual Property and Project-Relevant Independently Funded Intellectual Property

The Contractor has identified the following items as “project-relevant pre-existing intellectual property” and/or “project-relevant independently funded intellectual property, as defined in Sections 23 (Pre-Existing and Independently Funded Intellectual Property) and 28 (Definitions) of these terms and conditions. The Commission makes no ownership, license, or royalty claims to this property, and may only access it for the purposes described in Section 23 (Pre-Existing and Independently Funded Intellectual Property).

Name/Title of Intellectual Property	NONE
Type of Intellectual Property	<input type="checkbox"/> Project-relevant pre-existing intellectual property <input type="checkbox"/> Project-relevant independently funded intellectual property <input type="checkbox"/> Invention <input type="checkbox"/> Process <input type="checkbox"/> Technology <input type="checkbox"/> Technique <input type="checkbox"/> Design <input type="checkbox"/> Work of Authorship <input type="checkbox"/> Drawing <input type="checkbox"/> Trademark/ Service mark <input type="checkbox"/> Data <input type="checkbox"/> Logo <input type="checkbox"/> Software <input type="checkbox"/> Formula
Registered or Pending Intellectual Property (i.e., copyrights, patents, or trademarks that are registered or pending with the U.S. Copyright Office or the U.S. Patent and Trademark Office)	<input type="checkbox"/> Copyright <input type="checkbox"/> Patent <input type="checkbox"/> Trademark/ Service mark Name of owner: Number and date: <i>For pending applications</i> Name of applicant: Application number and date:
Unregistered Intellectual Property	<input type="checkbox"/> Copyright <input type="checkbox"/> Trademark/ Service mark <input type="checkbox"/> Trade Secret Name of owner:
Description of how the property will be or has been used to support a premise, postulate, or conclusion referred to or expressed in any deliverable under the Agreement	

4. Contractor-Owned Intellectual Property

The Commission has authorized the Contractor's ownership of the following Contractor Intellectual Property, as specified in Section 24 (Intellectual Property):

Name/Title of Intellectual Property	NONE	
Task Number(s) that Involve Development of the Intellectual Property		
Type of Intellectual Property	<input type="checkbox"/> Invention <input type="checkbox"/> Technology <input type="checkbox"/> Design <input type="checkbox"/> Drawing <input type="checkbox"/> Data <input type="checkbox"/> Software <input type="checkbox"/> Formula	<input type="checkbox"/> Process <input type="checkbox"/> Technique <input type="checkbox"/> Work of Authorship <input type="checkbox"/> Trademark/ Service mark <input type="checkbox"/> Logo

5. Contractor-Licensed Intellectual Property

The Commission has granted a license to the Contractor for the following Contractor Intellectual Property, as specified in Section 24 (Intellectual Property):

Name/Title of Intellectual Property	NONE
Task Number(s) that Involve Development of the Intellectual Property	
Type of Intellectual Property	<input type="checkbox"/> Invention <input type="checkbox"/> Process <input type="checkbox"/> Technology <input type="checkbox"/> Technique <input type="checkbox"/> Design <input type="checkbox"/> Work of Authorship <input type="checkbox"/> Drawing <input type="checkbox"/> Trademark/ Service mark <input type="checkbox"/> Data <input type="checkbox"/> Logo <input type="checkbox"/> Software <input type="checkbox"/> Formula

Scope of License	<input type="checkbox"/> No-cost <input type="checkbox"/> Worldwide <input type="checkbox"/> Perpetual <input type="checkbox"/> Non-exclusive <input type="checkbox"/> Transferable (<i>transfers are subject to the royalty requirements in Section 26</i>). If the “No-cost,” “Worldwide,” and/or “Perpetual” boxes are not checked above, describe the cost terms and geographic and/or time restrictions below:
Permitted Uses	<input type="checkbox"/> Use <input type="checkbox"/> Modify <input type="checkbox"/> Publish <input type="checkbox"/> Reproduce <input type="checkbox"/> Translate Describe how the intellectual property will be used, published, translated, modified, and/or reproduced: